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In The

Supreme Court of the United States

JOYTIME DISTRIBUTORS AND AMUSEMENT CO., INC.,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE STATE OF SOUTH CAROLINA SUPREME COURT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the court below infringe fundamental First Amendment freedoms of the South Carolina electorate by first enjoining the referendum on video gaming, and then itself deciding that such gaming should be outlawed?

2. Whether the United States Constitution requires, as a guarantee of a republican form of government, that all state legislatures have the power to refer acts to the electorate for the exercise of its veto power?

PARTIES TO THE PROCEEDING

Petitioner, Joytime Distributors & Amusement Company, Inc., is a corporation in good standing engaged in the video gaming industry pursuant to the laws of the State of South Carolina. Petitioner was plaintiff before the lower court in this action, the Supreme Court of the South Carolina. Respondent, the State of South Carolina, was a defendant in this action before the Supreme Court of South Carolina.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, petitioner declares that it has no parent companies or any wholly owned subsidies.

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OPINIONS BELOW

The decision of the Supreme Court of South Carolina in *Joytime Distributors & Amusement Co. v. State of South Carolina,* rendered on October 14, 1999, is unreported (*see* App. 1). Petitioner sought a rehearing of the case from the Supreme Court of South Carolina which was denied on October 20, 1999 (*see* App. 22). On January 7, 2000, upon obtaining new counsel, petitioner sought an extension of time for filing this Petition which was granted by this Court, giving petitioner until February 17, 2000 for filing of the Petition.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the Supreme Court of South Carolina on October 14, 1999 (*see* App.1). A petition for rehearing sought by petitioner was denied on October 20, 1999 (*see* App. 22). An extension of time for filing this Petition for Writ of Certiorari was granted to petitioner on January 12, 2000, setting February 17, 2000 as the deadline for filing the petition. The jurisdiction of this Court to review the opinion of the Supreme Court of South Carolina is invoked under 28 U.S.C. § 1257 (West 1999).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Republican Form of Government Clause of Article Four, Section Four, to the United States Constitution provides, in pertinent part, that: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const., art. IV, § 4 (1999).

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall

make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend I (West 1999).

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const., amend. XIV, § 1 (West 1999).

The South Carolina Constitution states, in pertinent part, that: "All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government." S.C. Const., art. I, § 1 (1999). The South Carolina Constitution also states in Article III, in pertinent part, that: "The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'" S.C. Const., art. III, § 1 (1999).

Act 125, enacted during the 1999 South Carolina General Assembly, is also cited repeatedly throughout this Petition for Writ of Certiorari (*see* App. 23).

STATEMENT OF THE CASE

This case arises from efforts in the South Carolina General Assembly to abolish video gaming in South Carolina. During the entire course of the 1999 session of the General Assembly, efforts to abolish video gaming failed. By Executive Order 99-32, dated June 24, 1999, Governor Jim Hodges ordered the General Assembly to convene in special session and effectively held the General Assembly in session until a statute could be passed concerning video gaming. A Joint Committee of the House of Representatives and the Senate had developed a compromise bill which was, in various forms, repeatedly rejected in both the Regular

Session and the Special Session of the General Assembly. This compromise bill ultimately became Act 125 which was submitted to both the House and Senate and ratified on July 1, 1999. Act 125, as ratified, contained six parts. Part I prohibited cash payouts on video gaming devices as of July 1, 2000. Part II required that a referendum be held to put before the voters of the state a specific question to which the response would be "yes" or "no", stating: "Shall cash payouts for credits earned on video game machines continue to be allowed after June 30, 2000?" Part III provided a regulatory scheme for the video gaming industry to be put into effect if the referendum resulted in a majority "yes" vote. Part IV dealt with gambling losses and civil actions. Part V included a severability clause, savings clause and intent section. The legislative intent was "to allow an affirmative vote of the qualified electors of this State to serve as a trigger for the operation of the effective clause ...." (App. 130). Part VI is the "effective clause" mentioned in Part V and provides the effective dates upon which each section of the Act is to "take effect." Part I was to take effect on July 1, 2000. (*see* App. 130-131).

The precise language of the bill enacted by the South Carolina legislature:

> Referendum
>
> SECTION 9. (1) A statewide referendum must be conducted November 2, 1999, to ascertain whether or not video game machine payouts will continue to be allowed in this State. The State Election Commission shall place the exact question contained in item (2) of this subsection on the referendum ballot. The state election laws shall apply to the referendum, mutatis mutandis. The State Board of Canvassers shall publish the results of the referendum and certify them to the

> Secretary of State, the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Code Commissioner.
>
> (2) The question put before the qualified electors in the referendum shall read: "Shall cash payouts for credits earned on video game machines continue to be allowed after June 30, 2000?
>
> Yes [ ]
>
> No [ ]
>
> Those voting in favor of the question shall deposit a ballot with a check or cross mark in the square after the word 'Yes', and those voting against the question shall deposit a ballot with a check or cross mark in the square after the word 'No.'

The court below found in no uncertain terms that the legislature, by this bill, had attempted to transfer its legislative decision-making power to another body (the electorate), rather than deciding the video gaming issue for itself. *Joytime Distributors & Amusement, Co. v. South Carolina*, No. 25007, 1999 WL 969280 at (S.C. Oct. 14, 1999) (*see* App. 13). Indeed, that is precisely what Act 125 does: "A statewide referendum must be conducted November 2, 1999, to ascertain whether or not video game machine payouts will continue to be allowed in this State." The legislature wished to submit to the electorate the question of whether or not video gaming should continue to be allowed in the state, rather than decide that issue itself.

While the petitioner sought to have the statutory scheme declared illegal, the court below utilized the petitioner's challenge to engage in the very conduct to which petitioner objects; determination of a legislative matter by non-legislative means. By itself choosing that video gaming should be outlawed, the court below created a variant on the very issue it had addressed, may the legislative power be delegated to or assumed by the court in lieu of the referendum prescribed by the legislature? Resolution of this remedial determination, as with resolution of the case on its merits, implicates critical issues of separation of powers inherent in a republican form of government, as well as First and Fourteenth Amendment rights of South Carolina citizens.

Procedural Background

Petitioner, a corporation engaged in the video gaming industry and a licensed owner of 164 video gaming machines located in several South Carolina counties, sought a declaration as to the constitutionality of Act 125 in the Court of Common Pleas in Greenville County, South Carolina on September 2, 1999. Prior to the expiration of the time for answering the complaint, on September 17, 1999, the Attorney General for the state of South Carolina petitioned the Supreme Court of South Carolina to hear the case in its original jurisdiction.

By order dated September 24, 1999, the court granted the Attorney General's petition and ordered an expedited briefing schedule. The court also granted the petitions of PedroLand, Inc., a South Carolina Corporation that owns and operates Class III video gaming machines located in South Carolina, and of David H. Wilkins, Speaker of the South

Carolina House of Representatives, to appear as *amici curiae*.[1]

On October 14, 1999, the Supreme Court of South Carolina held that Part II of Act 125, providing for the referendum procedure, amounted to an unconstitutional delegation of power by the legislature to the voters of the state of South Carolina and thus, enjoined the referendum. *Joytime Distributors* at (*see* App. 13, 20). The court also found that the portions of Part III of the Act which provided for regulation of the video gaming industry, contingent upon the referendum in Part II, were also invalid. *Id.* at (*see* App. 17-18, 20). The court, exercising a severability clause contained in the Act (Part V, § 20), proceeded to hold that the portions of the Act which constituted an unconstitutional delegation of power were severable from the remainder of the Act, leaving Part I and Part IV as portions which were free-standing and could, therefore, be upheld. *Id.* at (*see*

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[1] The petitioner notes that, as a result of the way in which the court below decided this case, both petitioner and respondent have adopted positions in this Court which are at odds with the positions they took in the court below. Petitioner argues in this Petition for Writ of Certiorari that Act 125 was a valid exercise of the legislature's inherent legislative power, and that the decision of the court below unconstitutionally deprived both the legislature and the electorate of rights guaranteed by the First Amendment and the Guarantee Clause. Respondent, in its objection to petitioner's motion for an extension of time to file this Petition for Writ of Certiorari, now argues that the decision by the South Carolina Supreme Court finding Act 125's provision for referendum an unconstitutional delegation of legislative power should be upheld. A party's change in position during the course of a case does not necessarily defeat that party's standing to appeal, so long as a true case and controversy is involved. *See e.g., Bob Jones University v. United States*, 461 U.S. 574, 585 n.9 (1983) (allowing the Government to assert a position on review contrary to that which it had espoused in the courts below); *United States v. X-citement Video*, 513 U.S. 64, 78 (1994)). Since the decision of the court below outlaws petitioner's entire livelihood as of July 1, 2000, petitioner clearly did not prevail, assuring the case or controversy required by Article III for this Court to exercise jurisdiction over the matter.

App. 15-18, 20). The effect of the court's opinion was to decide for itself, contrary to the legislative intent, to outlaw video gaming in the state of South Carolina as of July 1, 2000. *Id.* at (*see* App. 17, 20).

Petitioner filed a petition for rehearing before the Supreme Court of South Carolina which was denied on October 20, 1999 (*see* App. 22). Petitioner then, upon obtaining new counsel, moved this Court for an extension of time to file the present Petition which was granted.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION OF WHETHER THE COURT BELOW INFRINGED FUNDAMENTAL FIRST AMENDMENT FREEDOMS OF THE SOUTH CAROLINA ELECTORATE BY FIRST ENJOINING THE REFERENDUM ON VIDEO GAMING, AND THEN ITSELF DECIDING THAT SUCH GAMING SHOULD BE OUTLAWED.

James Madison clearly identified the fundamental tension, inherent in our constitutional system between the necessary delegation of power to government institutions and the retention of ultimate political authority in the people:

> If men were angels, no government would be necessary ... In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt the primary control of the government; but experience has taught

> mankind the necessity of auxiliary institutions.

Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11 (1997) (citing The Federalist No. 51 at 322 (James Madison) (Clinton Rossiter ed., 1961)). Among these institutions are the right to have laws passed by elected representatives, and the right to engage in the cluster of political freedoms - freedom of speech, press, assembly, and petition of the government for redress of grievances - contained in the First Amendment. On the other hand, judicial review also plays a critical role in maintaining the rule of law and the orderliness of all of these political institutions.

The question in this case is whether the court below exceeded the prerogatives of legitimate judicial review on an issue of intense political interest in South Carolina by depriving the electorate of that state of the ability to debate and vote upon the issue of video gaming. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *see Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.")

The cluster of fundamental First Amendment freedoms embodies the liberty interests of the individual, which may not be infringed by the state without very good cause. "The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). "The very

purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind.... In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

This case pits the right of referendum against the power of judicial review. The legislature of South Carolina sought to submit the issue of video gaming to the electorate for a vote, but the court below deprived the electorate of that opportunity for debate and political change. As this Court has stated:

> [S]tatutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. . . .The decision in *Posadas* does not suggest that "the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling."

Meyer v Grant, 486 U.S. 414, 423, 425 (1988) (citing 828 F.2d 1446, 1456 (10th Cir. 1987).

Although reasonable regulation is certainly necessary to insure the integrity of the referendum process, this Court has not been hesitant to utilize strict scrutiny to strike down those regulations which are not narrowly tailored to insure maximum protection of First Amendment political rights:

> As mentioned previously, in *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988), we struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions. Petition circulation, we held, is "core political speech," because it

> involves "interactive communication concerning political change." First Amendment protection for such interaction, we agreed, is "at its zenith."

Buckley v. American Constitutional Law Foundation, Inc., 119 S. Ct. 636, 639-40 (1999) (striking down requirements that signature gatherers wear identification badges and be registered voters) (quoting *Meyer v. Grant*). Importantly, these cases struck down regulations which limited First Amendment freedoms, thus exercising the power of judicial review to enhance individual political freedoms.

In contrast, the decision below held that the people of South Carolina have no right to vote on a hotly contested political question, even when the legislature wishes the people to make that important policy choice. By striking down the referendum on video gaming and then severing the referendum provision from Act 125, the court below managed itself to make the determination which the legislature had not made and wished to submit to the electorate. That action itself bears close scrutiny, for it runs the risk that "[s]triking it down is an act, not of judicial judgment, but of political will." *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting)

As evidenced by the numerous cases involving referenda and initiative, there is no bright-line test for state constraints on First Amendment freedoms. "We have several times said `no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." *Buckley*, 119 S.Ct. at 642 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

This case is particularly timely. As a recent commentator has noted: "The renewed use of the tools of direct democracy in the 1990s portends even more frequent clashes between the ultra-democracy of direct legislation and ultimate anti-democracy of an unelected and, at the federal

level, virtually unremovable judiciary." Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 12 (1997). Certiorari should therefore be granted.

II. THIS CASE RAISES FUNDAMENTAL JUSTICIABLE QUESTIONS REGARDING THE MEANING OF THE "REPUBLICAN FORM OF GOVERNMENT" REQUIRED OF ALL STATES BY THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION.

The focal point of the Guarantee Clause is the legislative function: that is, the enactment of laws by legislators elected to office by the people. If the clause guarantees anything, it is that the legislative prerogative shall not be impaired—whether by federal legislation (*New York v. United States*, 505 U.S. 144 (1992)) or by the State Constitution. Were a State Constitution to abolish the legislature and provide, for example, that all laws should be decreed by the Governor or the Supreme Court, that State Constitution would surely violate the Guarantee Clause, presenting a justiciable issue of federal constitutional law.

Similarly, where the State Constitution (as interpreted by the State's highest court) prohibits the legislature from performing an inherent legislative function, a justiciable issue arises as to whether that denial of an essential legislative prerogative is so substantial as, in effect, to impair the state's republican form of government. *New York v. United States*, 505 U.S. at 184-85 ("More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.") (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964)). In such a case - and that is this case - the question presented is whether the legislative function at issue (here, the submission of legislation to the electorate for approval or disapproval) is, in

fact, an inherent legislative function, the abnegation of which so infringes on the legislature's ability to perform its function as to violate the guarantee of a republican form of government.[2]

Two diametrically opposed lines of authority have developed, one characterizing the referendum process as an inherent power of any legislature to submit an issue to the electorate for approval or disapproval, and the other striking down such referenda as unlawful attempts to delegate the legislative power to a body (the electorate) other than the legislature.[3] This case affords the Court the opportunity to resolve this vexing and long-running debate which has embroiled so many state statutes (usually dealing with highly controversial issues) in contentious litigation.

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[2] Of course, the ultimate purpose of this guarantee, as with other structural principles of the Constitution such as federalism and separation of powers, is to "'secure[] to citizens the liberties that derive from the diffusion of sovereign power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" *New York v. United States*, 505 U.S. 144, 181-82 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

[3] The term "referenda" is sometimes used to describe both the submission of proposed legislation to the electorate for approval or disapproval (as in this case), and the submission to the electorate of multiple choices among possible legislation, as well as initiatives originating by petition and not passed by the legislature at all. Here, petitioner uses the term "referendum" in its narrower sense i.e., the submission of legislation passed by the legislature for approval or disapproval by the electorate.

A. Referendum as an inherent legislative power

The first line of cases views the legislative power as plenary, limited only by specific prohibitions contained in the State Constitution. An excellent example of this analysis is *Wyatt v. Kundert*, 375 N.W.2d 186 (S.D. 1985), upholding the state legislature's submission to referendum of a bill which would approve the State's entry into a compact regarding the disposal of nuclear waste:

> The South Dakota Constitution, unlike the Constitution of the United States, does not constitute a grant of legislative power. Instead, our constitution is but a limitation upon the legislative power and the legislature may exercise that power in any manner not expressly or inferentially proscribed by the federal or state constitutions. Thus, except as limited by the state and federal constitutions, the legislative power of the state legislature is unlimited. "What the representatives of the people have not been forbidden to do by the organic law, that they may do." "Consequently, in determining whether an act is unconstitutional we search the state and federal constitutions for provisions which prohibit its enactment rather than for grants of such power." A presumption in favor of constitutionality is also accorded any legislative act and that presumption is not overcome until the act is clearly and unmistakably shown to be unconstitutional and no reasonable doubt exists that it violates constitutional principles.

Id. at 190-91 (quoting *State ex rel. Payne v. Reeves*, 184 N.W. 993, 996 (1921)) (internal citations omitted).

The South Carolina Legislature shares the opinion that its legislative authority is plenary in nature. Part V of the statutory scheme provides:

> ...All provisions in this act are enactments of the General Assembly that meet the formalities of an act required under Article III of the Constitution of this State which provides for the legislative power in the government of this State. While Article III does not provide for a referendum as part of the legislative process, neither does it prohibit a referendum in which the result is a certain contingency that determines which parts of an act take effect. As the legislative power of the General Assembly is limited only by that which is specifically prohibited in the Constitution of this State and the Constitution of the United States, the General Assembly finds that the referendum required pursuant to this act is a valid exercise of the legislative power of this State.

(App. 130).

This Court has viewed the submission of legislative enactments to a general referendum as entirely consistent with the legislative power. In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), this Court reversed a holding of the Ohio Supreme Court (similar to the instant case) that a general referendum on zoning changes constitutes an unlawful delegation of legislative power. Stressing that legislative power derives in the first instance from the people who then delegate that power to the legislature, Chief Justice Burger pointed out that the people may reserve to themselves a portion of that power in the form of the right of referendum:

> A *referendum* cannot, however, be characterized as a *delegation* of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the *legislature.*

Id. at 672 (citing The Federalist No. 39 (v. Madison); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969)) (emphasis in original).

Under this analysis, the referendum is not "legislating" at all, but "allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *Eastlake*, 426 U.S. at 673. Thus, the referendum is a quite different mechanism from attempted delegations of legislative power to administrative agencies. "[T]hese cases involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the people; this doctrine is inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves." *Id.* at 675; *cf. A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding delegation of legislative power to administrative agencies unconstitutional); *but see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (upholding a Congressional delegation of rulemaking power to administrative agency).

In *Eastlake*, this Court also distinguished two cases, relied on by the Ohio Supreme Court to strike down the referendum, in which the legislature sought to delegate decision-making to a small segment of the public, rather than to the electorate at large:

> The thread common to both decisions is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a Narrow segment of the community, not to the people at large.

Eastlake, 426 U.S. at 677 (citing *Eubank v. Richmond*, 226 U.S. 137 (1912)).

Relying on *Eastlake*, the Supreme Court of South Dakota also reached the conclusion that the legislature possesses the inherent power to submit an issue to referendum precisely because a referendum is not a legislative act: "As early as 1913, this Court, in *State ex rel. Wagner v. Summers*, 33 S.D. at 50, 144 N.W. at 732, recognized that the 'exercise of the referendum is not an exercise of delegated legislative power; it is in effect the exercise of the veto power. *Wyatt*, 375 N.W.2d at 193. Consequently, the court concluded: "A referendum is not a delegation of legislative power. On the contrary, it is the exercise of the veto power. Plaintiffs' contentions in opposition are not sustainable." *Id.*

B. Referendum as unconstitutional delegation of Legislative power

The opposing view, adopted by the court below, does not see the power of the legislature to submit an issue to the ballot as inherent legislative authority, but rather as its opposite—the delegation of legislative authority to a body (the electorate) which is not authorized to legislate. Under this theory, unless the state constitution specifically authorizes the legislature to submit a matter to referendum, the legislature does not possess that power.

The court below relied heavily on an advisory opinion of the Supreme Court of New Hampshire, advising the legislature that it could not constitutionally submit for referendum two alternative schemes for assessing state taxes:

> One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted [sic] cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.

Opinion of the Justices (Tax Plan Referendum), 725 A.2d 1082, 1091 (N.H. 1999) (citing *State v. Hayes*, 61 N.H. 264, 325 (1881) (quotation omitted)).

Under this analysis, the general electorate is viewed no differently from an administrative agency and, consequently, submission of a legislative matter to referendum to the electorate is forbidden. The court further held:

> The purpose of the bill is to "authorize the legislature to seek the consent of the people, through a binding referendum, for a newly established tax." If the people are to say, by way of popular vote, whether or not an act shall

> become law, they are put in the place of the legislature. The vote of the people becomes the determining factor whether an act shall be the law or not, not simply a contingency upon which certain things are or are not to be done under the law. This would grant the people the "supreme legislative power" that by the constitution is vested in the senate and house of representatives.

Id. at 1092.

The court below adopted, for the state of South Carolina, the rule enunciated by the New Hampshire Supreme Court:

> Like New Hampshire's constitution, this state's constitution is premised upon the philosophy of John Locke and this Court agrees with the statement made by the New Hampshire Supreme Court in 1881, and reaffirmed by that Court this year, that: ". . . By the constitution, legislative power is vested not in the towns, but in the senate and house of representatives. And without a well established ground of exception, the senate and house are as incapable of delegating their legislative power, as the governor and council are of delegating the power of pardon, or the court of delegating the power of deciding the constitutional question raised in these cases. All power is derived from the people, and all magistrates and officers of government are their agents, and at all times accountable to them. And these agents have not a general authority to avoid their official responsibility by relegating their duties to their assignees. If the legislative seats were filled with substitutes, it would not be claimed that a

> bill passed by them was law. The vote of a body of substitutes, assembled in the state-house or elsewhere, is not legislation, unless authorized by a legal construction of the constitution. . . .

Joytime Distributors, at (*See* App. 7) (citing *Opinion of the Justices*, 725 A.2d at 1087) (citing *State ex rel. Pearson v. Hayes*, 61 N.H. 264, 329 (1881) (internal citations and quotations marks omitted))); *see also Gibson County Special School Dist. v. Palmer*, 691 S.W.2d 544 (Tenn. 1985); *Board of Public Works v. Baltimore County*, 421 A.2d 588 (Md. 1980); *In re Municipal Suffrage To Women*, 36 N.E. 488 (Mass. 1894).

Thus, the decision below raises a fundamental question regarding the essence of the republican form of government guaranteed by Art. IV, Sec. 4 of the federal Constitution: Does the state legislature possess, as an essential element of the legislative power, authority to enact a bill which does not become law until voted upon by the general electorate at a referendum, in accordance with the state's established voting procedure? Or, as the court below held, is this power inherently denied to the legislature unless specifically granted to it by the state constitution? Resolution of this issue is of particular importance because the kind of issues generally submitted by the legislature to a general referendum typically concern matters of intense public concern (e.g., nuclear waste, taxation, gambling). This Court should therefore grant certiorari to review and decide this important, unresolved, and urgent issue of constitutional law.

CONCLUSION

For all the above discussed reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. 99-1406 FEB 17 2000

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOYTIME DISTRIBUTORS AND AMUSEMENT CO., INC.,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE STATE OF SOUTH CAROLINA SUPREME COURT

Appendix to Petition for Writ of Certiorari

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joytime Distributors and Amusement Co. Inc., Plaintiff,

v.

The State of South Carolina, Defendant.

IN THE ORIGINAL JURISDICTION

Opinion No. 25007
Heard October 12, 1999 - Filed October 14, 1999
Entered October 14, 1999

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Attorney General Charles Molony Condon, Assistant Deputy Attorney General Robert D. Cook, Senior Assistant Attorneys General Nathan Kaminski, Jr., and Kenneth P. Woodington, Assistant Attorney General Christie Newman Barrett, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for defendant.

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, and J. Boone Aiken, III, of Aiken, Nunn, Elliott & Tyler, P.A., of Florence, for Amicus Curiae PedroLand, Inc.

Reginald I. Lloyd, Counsel to the House Judiciary Committee, and Charles F. Reid, Counsel to the Speaker of the House, both of Columbia, for Amicus Curiae David H. Wilkins.

PER CURIAM: This matter is pending in the Court's original jurisdiction. Plaintiff (Joytime) is a South Carolina corporation engaged in the video gaming industry with

gaming machines located in several South Carolina counties. Joytime seeks a declaration as to the constitutionality of Act No. 125, 1999 S.C. Acts. Joytime asserts that Part II of Act 125 is an unconstitutional delegation of power by the legislature to the voters of this State and asks the Court to enjoin the enforcement of Act 125. The State has filed a brief contending that Act 125 is constitutional and, if not, the Act is severable. We agree with Joytime that Part II of Act 125 is unconstitutional but hold the portion of Act 125 which constitutes an unconstitutional delegation of power is severable from the remainder of the Act.

Facts and Proceedings

Because the General Assembly was unable to agree on comprehensive video gaming legislation, the Governor, by Executive Order, called an extra session of the General Assembly to meet on Tuesday, June 29, 1999. Executive Dep't, State of South Carolina, Exec. Order No. 99-192 (signed by Governor James Hovis Hodges). During that extra session, the General Assembly enacted Act 125, which was ratified on July 1, 1999, and signed by the Governor on July 2, 1999.

Act 125 is legislation relating to video gaming machines and is composed of six parts. Part I prohibits cash payouts on video gaming devices effective July 1, 2000. Part II requires that a referendum be held "to ascertain whether or not video game machine payouts will continue to be allowed in this State." Act 125, Part II, § 9(1), 1999 S.C. Acts. The specific question voters are asked to consider is: "Shall cash payouts for credits earned on video game machines continue to be allowed after June 30, 2000?" Act 125, Part II, § 9(2), 1999 S.C. Acts. Part III provides for regulation of the video gaming industry if the referendum called for in Part II results in a majority "yes" vote. Part IV deals with gambling losses and civil actions. Part V includes a severability clause, a savings clause, and an intent section, and Part VI states the

effective dates of the various parts and certain specific sections of the Act.

Joytime initiated this action on September 2, 1999, alleging that Act Joytime Distributors and Amusement Co., Inc. v. State 125 is violative of the South Carolina Constitution. Prior to the expiration of the time for answering the complaint, the Attorney General petitioned this Court to hear the matter in its original jurisdiction. By order dated September 24, 1999, the Court granted the Attorney General's petition and ordered an expedited briefing schedule. The Court also granted the petitions of PedroLand, Inc., a South Carolina Corporation which owns and operates Class III video game machines (video poker machines) at locations in Dillon County, South Carolina, and David H. Wilkins, Speaker of the South Carolina House of Representatives, to appear as amici curiae.

Having considered the briefs and appendices filed with the Court, and the arguments of the parties at the hearing in this matter, we discuss the questions of whether Joytime has standing to bring this matter, whether the referendum constitutes an unlawful delegation of the legislature's power, whether portions of Act 125 are severable, whether it is proper for this Court to issue an injunction, and whether the surcharge on license fees is valid.

Standing

PedroLand, as amicus curiae, asserts that Joytime does not have standing to prosecute this action. PedroLand contends that Joytime has not alleged an injury to differentiate it from the general public. We disagree.

Standing to sue is a fundamental requirement in instituting an action. A private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or

that there is immediate danger a direct injury will be sustained. Ex parte Levitt, 302 U.S. 633, 58 S. Ct. 1, 82 L. Ed. 493 (1937); Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985). Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public. Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992).

In this case, Joytime is required by Part II, § 9(4) of Act 125 to pay a license surcharge to fund the referendum. Further, Act 125 will directly affect Joytime's business. Part I of Act 125 bans video gaming machines as of July 1, 2000. Part III of Act 125 provides for more extensive regulation and taxation than that in effect when Act 125 was adopted and requires Joytime to connect to a central monitoring system.

Although this action is of general interest to all members of the public, in our opinion, Joytime has alleged an injury which is sufficiently personal to confer standing.

Unconstitutional Delegation of Power

Joytime contends that the legislature unconstitutionally delegated its power to enact laws by enacting Part II of Act 125. We agree.

This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. Westvaco Corp. v. South Carolina Dep't. of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995). A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for

reasonable doubt that it violates a provision of the constitution. Id.

Article III, § 1 of the South Carolina Constitution states:

> The legislative power of this State shall be vested in two distinct branches, the one to be styled the "Senate" and the other the "House of Representatives" and both together the "General Assembly of the State of South Carolina."

The Constitution of 1868 had an identical clause and had an additional provision, Art. I, § 41, which stated: "The enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people and all powers not herein designated are reserved for the people." In 1873, this Court was called upon to construe the two sections and stated the following:

> The true effect of this declaration [Art. I, § 41] is that it reserves to the people whatever is not granted by the instrument; as, for instance, the right to make changes in the form of government is not granted, and, under this clause, remains in the hands of the people, capable of exercise when they may see fit so to do. *As the legislative power is granted in express terms, importing a grant of general powers, such general powers of legislation cannot be regarded as reserved to the people* under this section. Such general language as that contained in section 41 of article 1 cannot be allowed such force and effect as to change entirely the nature of the legislative power, and to introduce anomalous ideas in the structure of the government.

State v. Hayne, 4 S.C. 403, 421 (1873)(emphasis added). The present South Carolina Constitution does not have a reserve clause similar to Art. I, § 41, and, since the constitution does not contain a specific provision reserving to the people the power to legislate, in our opinion, Art. III, § 1 requires the legislature, not the people, to enact the general law.

Direct Legislation

In a direct democracy, the people are given the power to legislate directly. Direct legislation by the people may consist of initiatives by petition, referenda, and recalls. With initiatives by petition, a certain percentage of the voters of a state may propose by petition that a constitutional amendment or general law be enacted. If the subject matter of the initiative is not enacted by the lawmaking body, it must be submitted to the voters for ratification. A referendum is a vote by the people of the state as to whether to accept or reject a measure passed by the lawmaking body of that state. A recall allows the electors of a state to end the term of an elected official's office before its expiration date. William Munro, The Initiative Referendum and Recall, 1-2 (1912). Direct legislation grants the voters the option to propose legislation and decide state-wide policy issues themselves. It is direct democracy as opposed to representative democracy. David B. Magleby, Direct Legislation (1984).

However, Article III, § 1, of the South Carolina Constitution provides for a representative form of government in this state as opposed to a direct democracy. In Opinion of the Justices (Tax Plan Referendum), 725 A.2d 1082 (N.H. 1999), the New Hampshire Supreme Court considered whether a bill which proposed to allow the voters to determine which of two tax plans would be put into effect was unconstitutional direct legislation. The New Hampshire Constitution contains a provision that prohibits taxation ". . .

without the consent of the people, or their representatives in the legislature, or authority derived from that body . . . " N.H. Const. pt. I, art. 28. The court concluded that the phrase "the consent of the people" was not intended to establish a right of direct legislation on taxes, stating:

> Two broad rules of law apply in determining whether, and under what circumstance, the legislature has the authority to delegate its legislative powers to the voters. The first is that the legislature is prohibited from abdicating its legislative power . . . . The first rule is rooted both in the philosophy of John Locke - because the power to legislate is a delegated power from the people, the legislature has no power to delegate it to anyone else, . . . and in the separation of powers doctrine . . . .

Id. at 1090 (internal citations omitted). Like New Hampshire's constitution, this state's constitution is premised upon the philosophy of John Locke and this Court agrees with the statement made by the New Hampshire Supreme Court in 1881, and reaffirmed by that Court this year, that:

> The government organized by the constitution was considered to be, as it undoubtedly is, that of a representative republic, and no power existed in the legislature to convert it, on any occasion, or for any purpose, into a pure democracy. Legislative power can be delegated to towns only in local affairs. By the constitution, legislative power is vested not in the towns, but in the senate and house of representatives. And without a well established ground of exception, the senate and house are as

> incapable of delegating their legislative power, as the governor and council are of delegating the power of pardon, or the court of delegating the power of deciding the constitutional question raised in these cases. All power is derived from the people, and all magistrates and officers of government are their agents, and at all times accountable to them. And these agents have not a general authority to avoid their official responsibility by relegating their duties to their assignees. If the legislative seats were filled with substitutes, it would not be claimed that a bill passed by them was law. The vote of a body of substitutes, assembled in the state-house or elsewhere, is not legislation, unless authorized by a legal construction of the constitution . . .

Id. at 1087 (citing State ex rel. Pearson v. Hayes, 61 N.H. 264, 329 (1881)(internal citations and quotation marks omitted).

The West Committee, charged in 1969 with recommending amendments to the Constitution of 1895, considered a proposal to amend the constitution to allow for direct legislation through initiative petitions and referenda. The proposal was summarily rejected. Minutes of the West Committee, September 16, 1967, page 72. Further, as late as 1996, a bill was introduced in the House which would have provided for an amendment to the constitution to allow for direct legislation by the people of the state. It was referred to committee and saw no further action. H. R. 4479, 111th Leg., 2d Sess. (1996); [1996] I S.C. House J. 267-68.

In our opinion it is clear that our constitution does not give the people the right of direct legislation by referendum.

Delegation of Authority to Execute Laws

On a number of occasions, this Court has held that the power to legislate cannot be delegated to private persons or corporations. See State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972). Although the legislature may delegate its authority to create rules and regulations to *carry out* a law, he legislature may not delegate its power to *make* the law. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938); State ex rel. Richards v. Moorer, 152 S.C. 455, 150 S.E. 269 (1929). In discussing the distinction between making and carrying out the law, the Court in Moorer quoted J. G. Sutherland, Sutherland on Statutory Construction, § 68 (1891) for the following:

> [The distinction] is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter, no valid objection can be made.

Id. at 479, 150 S.E. at 297 (internal citations omitted). In the present case, it is clear that the legislature has not delegated merely the authority to execute a law but has delegated the authority to make a law.

Constitutional Delegations of Lawmaking Authority

Article XVI, §§ 1 and 2 of our constitution provide that proposed constitutional amendments must be submitted to the voters. However, even in amending the constitution, the people of the state have not retained exclusive power. Although amendments to the constitution must be approved by the people, even if they are approved, the next General

Assembly must still ratify the approved amendments by a majority vote before they become effective.[1]

A number of other sections of the constitution specially require a referendum by the people who will be affected by the legislation. See S.C. Const. art. VIII, § 8 (incorporation of new municipalities); art. VIII, § 16 (acquisition and operation of public utilities systems); art. X, § 13 (bonded indebtedness of the state); art. X, § 14 (bonded indebtedness of political subdivisions); art. X, § 15 (bonded indebtedness of school districts). Under the maxim of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another) the inclusion of provisions for a referendum in certain circumstances means a referendum is not contemplated in other circumstances. See Opinion of the Justices, 725 A.2d at 1089 ("That the framers of our constitution knew how to employ language providing for a direct vote of the people on an issue of state-wide concern is evidenced by the provision for constitutional amendment.").

We hold that the silence of the constitution on the ability of the people to enact laws by referendum does not constitute an implied grant of that right.

Act 125 as Contingent Legislation

This Court has recognized the general rule that statutes that go into effect only on a certain contingency are constitutional. Beaufort County v. Jasper County, 220 S.C. 469, 68 S.E.2d 421 (1951). In Part V, § 22 of Act 125 the legislature acknowledges that there is no provision in the constitution which allows the people to enact laws by referendum. Section 22 attempts to justify the

[1]We note that in the The Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 123 (1969), a recommendation was made to delete the provision requiring ratification by the legislature after the people voted for an amendment. That recommendation was not adopted.

constitutionality of the Act by stating that the referendum will result in a "contingency that is certain" that will determine which parts of Act 125 take effect.

In Beaufort County, we stated:

> The fact that the Legislature saw fit to make the Act effective only on the happening of a certain contingency does not affect the validity of the Act. The applicable rule is stated in 11 Am. Jur., p. 926, § 216, as follows: "The rule is well settled that while the Legislature may not delegate its power to make a law, it may make a law to become operative on the happening of a certain contingency of future event. Moreover, in general it makes no essential difference what is the nature of the contingency if it is essentially just and legal. The reason for this rule is that it is not always essential that a legislative act must in any event take effect as law after it leaves the hands of the Legislature. *If the law is in its provisions a complete statute in other respects, its taking effect may be made conditional upon some subsequent event.* When that event happens, the statute takes effect and becomes the law by force of legislative action as fully as if the time when it should take effect had been unconditionally fixed."

Id. at 488, 68 S.E.2d at 430 (emphasis added). In Beaufort County, the "event" upon which the legislation would become effective was a ruling that the legislation was constitutional. Since the legislation could not be effective if it were held unconstitutional, we question whether the Court even needed to address the issue. At any rate, here, the

"event" is a vote of the people as to *which portion* of Act 125 will become effective.

A majority of courts addressing this issue has rejected the argument that a vote of the majority of the people constitutes a certain contingency. In rejecting an argument that a referendum of the people sufficed as a contingent event, the court in Ex parte Wall, 48 Cal. 279, 315 (1874), stated:

> The Legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present conditions or future contingencies. To say that the legislators may deem a law to be expedient, provided the people shall deem it expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the Constitution has intrusted the prerogative of determining whether a law is or is not expedient.

The court in Barto v. Himrod, 8 N.Y. 483 (1853), which is cited by most courts rejecting the theory that a vote of the people is an event upon which legislation may be contingent, explained:

> The event or change of circumstances on which a law may be made to take effect, must be such as in the judgment of the legislature affects the question of the expediency of the law: an event on which the expediency of the law, in the judgment of the law makers, depends. On this question of expediency, the legislature must exercise its own judgment definitively and finally. When a law is made to take effect upon the

> happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen; but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves and then perform the duty which the constitution imposes upon them.

Id. at 490. In our opinion, Act 125 cannot stand under the general rule regarding "certain contingencies."[2] Act 125 is not a "complete statute in other respects," and leaves to the majority of the voters the decision as to which portion of the Act is "expedient."

State-wide versus Local Referenda

The State also asserts that there is no reason to distinguish a state-wide referendum from local option referenda which have been held valid. In the case of local

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[2]Cases upholding conditional legislation as not being an unlawful delegation of power include: Cargo of the Brig Aurora v. United States, 7 Cranch (11 U.S.) 382, 3 L. Ed. 378 (1812)(suspension of trade with foreign nations contingent upon those nations' continued violation of neutral commerce of United States); Opinion of the Justices, 344 So. 2d 1196 (Ala. 1977)(contingent upon continued federal appropriations); Opinion of the Justices, 251 So. 2d 744 (Ala. 1971)(increase in gas tax contingent upon future adoption of constitutional amendment); State ex rel. Douglas v. Sporhase, 305 N.W.2d 614 (Neb. 1981)(issuance of permit to transfer water out of state contingent upon reciprocal statutory provision in sister state); State v. Padley, 237 N.W.2d 883 (Neb. 1976)(raising speed limit contingent upon presidential termination of federal conservation act); Diversified Inv. Partnership v. Department of Social & Health Services, 775 P.2d 947 (Wash. 1989)(operation of statutes related to state reimbursement for nursing homes conditioned on no conflict with federal law that would jeopardize federal funding). These cases appear to stand for the proposition that the "contingent event" must be outside the control of the body enacting the law.

options, however, the legislature has enacted a complete law and left to municipalities or other governmental entities, each having unique needs and circumstances, the decision whether the law will be effective. The Constitution mandates that the legislature provide by general law the powers, duties, and functions of counties and municipalities. S.C. Const. art. VIII, §§ 7 and 9. That the legislature may on occasion provide that local governments may, by popular vote, decide if a legislative enactment, relating to the local governmental entities' police, taxing, or other power, should have effect in that locality is not an unlawful delegation of legislative power. As stated in Gaud v. Walker, 214 S.C. 451, 462, 53 S.E.2d 316, 321 (1949)(quoting 11 Am.Jur. Constitutional Law, § 223):

> It is a well settled rule, supported with practical unanimity by the authorities, that the general doctrine prohibiting the delegation of legislative authority has no application to the vesting in political subdivisions of powers to govern matters which are local in scope.

Here, in contrast, the legislature has left it to the people to determine what the general law will be.

In our opinion, Part II of Act 125 constitutes an unconstitutional attempt to delegate to the people the legislature's power to set the policy of the state and enact laws to effectuate that policy.[3]

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[3]The State also contends that this Court's decision in Chappell v. McCown, 103 S.C. 6, 87 S.E. 147 (1915), refusing to enjoin a 1915 referendum on the manufacture and sale of liquor, was a decision on the merits and should be controlling here. The Court issued an order "On the Merits" which **declined** to address any of the reasons offered why the injunction should have been issued or why it should not and simply said it was unanimously of the opinion that the injunction should be denied because the petitioner had an adequate remedy at law. In our opinion, Chappell, as discussed below, stands only for the rule that courts will generally not enjoin the holding of an election and does not have any

Severability

Part V, § 20 of Act 125 is a severability clause which provides as follows:

> If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this chapter, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

The State asserts that Part II, which requires the referendum, is severable from the remainder of the Act. The State argues that since Part VI, § 23(C) states that Part I becomes effective on July 1, 2000, if the referendum is found to be unconstitutional, video gaming will be outlawed on July 1, 2000. Joytime asserts that the Act is not severable and must be invalidated in its entirety. We agree with the State that Part II of Act 125 is severable.

The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the

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bearing on the question of whether a state-wide referendum is an unconstitutional delegation of legislative power.

constitution. Thomas v. Cooper River Park, 322 S.C. 32, 471 S.E.2d 170 (1996); Thayer v. South Carolina Tax Comm'n, 307 S.C. 6, 413 S.E.2d 810 (1992). "When the residue of an Act, *sans* that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." Dean v. Timmerman, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959).

Initially we find that the severability clause in Act 125 is strongly worded and evidences strong legislative intent that the several parts of Act 125 be treated independently. This intent to treat the several parts independently is also evident in the Title to the Act. See Lindsay v. Southern Farm Bureau Casualty Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972)(it is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature). The first clauses of the Title relate solely to Part I and end by stating the purpose as "prohibiting cash payouts for credits earned on video games machines on and after July 1, 2000." The first clauses are clearly separate from the next clause of the Title providing for the referendum in Part II of the Act, which we have determined is unconstitutional, and Part III, which regulates video games *in the event* Part I does not become effective.

The various substantive parts of the Act are also clearly separable:

Part I, as previously stated, bans payouts on video game machines; Part II provides for the referendum; Part III regulates the video game industry and provides for revised penalties and license fees *if* the referendum results in a "yes" vote; and Part IV amends S.C. Code Ann. §§ 32-1-10 to -30, to allow for recovery of gambling losses only where the gambling activity which resulted in the loss is unlawful. See Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993)(holding § 32-1-10, originally enacted in 1712 when

the Statutes of Anne were adopted, applied to losses incurred in playing legalized video gaming machines).

Part VI of Act 125 sets forth the effective dates of the various parts of the Act. While Section 23 (C) definitively states that Part I takes effect July 1, 2000, and Part IV takes effect on the governor's signature, the remaining effective dates are all contingent upon the outcome of the referendum contained in Part II.

Finally, the severability clause is followed by the intent clause in which, as previously noted, the General Assembly acknowledges that the constitution does not expressly provide for legislation by referendum. This acknowledgment, coupled with the severability clause, lends strong support to a finding that the legislature intended the referendum sections of the act be severable from the ban on video gaming.

Joytime asserts, however, that certain provisions in Act 125 became effective on June 1 and July 1 of this year and are only repealed in the case of a majority "no" vote; Act 125 contains no provision for their repeal without a referendum. Joytime contends this shows the entire Act is connected to the outcome of the referendum and Part II is incapable of being severed. However, those provisions relate, in the interim, to registering machines, to the number of video machines which are located on any one premise, and to casinos. The provisions are not inconsistent with the intent of the legislature to ban video gaming on July 1, 2000. Should the legislature fail to repeal those provisions when it reconvenes, they will be repealed by necessary implication. Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co., 295 S.C. 243, 368 S.E.2d 64 (1988).

This Court must be hesitant to declare any portion of a statute unconstitutional, and may invalidate only the unconstitutional part where to do so does not impair the remainder of the statute. Stone v. Traynham, 278 S.C. 407, 297 S.E.2d 420 (1982). In harmonizing the several Parts of Act 125 we believe the intent of the legislature to sever the

referendum portions of Act 125 is clear. We believe that Part I of Act 125 is capable of being executed independently of Part II without destroying the legislature's intent in passing Act 125 and invalidate only Part II and those other portions of Act 125 which rely on the outcome of the referendum to become effective.-

Propriety of Injunctive Relief

At oral argument, counsel for Joytime asked the Court to enjoin, not only the enforcement of Act 125, but the referendum itself. Traditionally, this Court has declined to enjoin elections since, after an election, an action at law may be brought to determine the validity of the results of the election. However, in a situation such as this, where the challenge to the referendum involves only a question of law we believe the Court should take action prior to the referendum being held.

In Chappell v. McCown, 103 S.C. 6, 87 S.E. 147 (1915), the Court was asked to enjoin the holding of a referendum which was very similar to the one at issue here. The General Assembly had passed an act calling for a popular vote on the question of continuing the manufacture and sale of liquor in the State. Act No. 76, 1915 S.C. Acts 88. That act provided that a majority "yes" vote would mean that all laws relating to the manufacture and sale of alcoholic beverages would remain in effect, and a "no" vote would repeal existing laws and make unlawful the manufacture and sale of liquor. A petition in the Court's original jurisdiction was filed seeking to have the referendum enjoined.

The Court, sitting *en banc* with eleven circuit court judges, issued an order refusing to issue an injunction and stating that the reasons for the denial would be reduced to writing at a later date. Some three months later, the Court issued an order entitled "On the Merits." However, the order specifically stated the Court declined to address any of the reasons offered why the injunction should have been issued

or why it should not and simply said the Court was unanimously of the opinion that the injunction should be denied because the petitioner had an adequate remedy at law.

Prior to its decision in Chappell, the Court had decided Parler v. Fogle, 78 S.C. 570, 59 S.E. 707 (1907). In Parler, the Court stated:

> [T]he power to interfere by injunction to prevent the expression of the popular will by an election, if it exists, should be exercised with the greatest caution; and only where, under the well-recognized rule of equity, there is no other adequate legal remedy, and it is made clear that an irremediable wrong will result from holding the election.

However, the Parler Court also recognized that:

> [C]ourts have enjoined popular elections . . . where there was no constitutional or statutory authority whatever for holding them. This doctrine has been applied principally where it was proposed under an unconstitutional statute to hold an election, the result of which would affect property rights.

Id. at 575, 59 S.E. at 709.

In Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1991), this Court reaffirmed its holding in Parler that a court rarely, if ever, may enjoin the expression of the popular will. At issue in that case was the validity of an ordinance initiated by petition. The Court held that pre-election review of the validity of the ordinance was appropriate to determine if the ordinance was facially invalid. The Court stated it was ". . . convinced that if an initiated ordinance is facially defective in its entirety, it is 'wholly unjustified to allow voters to give their time, thought, and deliberation to the question of the

desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain . . . .'" Id. at 455, 415 S.E.2d at 805 (quoting Schultz v. Philadelphia, 385 Pa. 79, 86, 122 A.2d 279, 283 (1956)).

In our opinion, the fact that the Court declined to review the merits of the petition for an injunction in Chappell is not dispositive of the present case. The Court in Chappell specifically declined to address the question of whether legislation by referendum was an unconstitutional delegation of the legislature's power.

We have determined that there is no constitutional authority for the referendum provided for in Part II of Act 125 and find this is one of those rare cases where an election should be enjoined.

Surcharge on License Fee

Part II, § 9(4) of Act 125 provides for a one-time surcharge license fee of $50 per licensed machine to be used to defray the costs of the referendum called for in Part II. Joytime states it paid the one-time surcharge fee on each license it holds under protest and contends that the fee imposed by Part II, § 9(4) violates various portions of the constitution. Because we have held that the referendum called for in Part II is unconstitutional, Joytime is entitled to a refund of the surcharge fees it has paid and the other constitutional arguments it raises are moot.

Conclusion

In conclusion, we hold that in enacting Part II of Act 125, the General Assembly unconstitutionally delegated its power to enact the general law of this state and we invalidate Part II of the Act and enjoin the holding of the referendum. Since Part II of Act 125 is invalid, those portions of Part III of the Act which provide for regulation of the video gaming

industry, contingent upon the referendum called for in Part II, are also invalid. Part I is a free standing enactment of the General Assembly, is severable from the unconstitutional portions of the Act, and is upheld. Should the General Assembly wish to revisit the ban on video gaming enacted in Part I when it meets next year, it may, of course, do so. Part IV of the Act is also a free standing legislative enactment which is severable from the unconstitutional portions of the Act and is upheld as constitutional. Finally, Joytime is entitled to a refund of the surcharge fees on its licenses it paid under Part II, § 9(4) of the Act.

Rule 221, SCACR, provides that a petition for rehearing must be received by the appellate court within fifteen days of the filing of an opinion of the court. Because of the nature of the decision we issue today, we find that the fifteen days allowed by Rule 221 should be shortened to five days. Accordingly, should any party desire to file a petition for rehearing, it must be received by this Court within five days of the date of this opinion.

This Court is directed by the constitution, and our precedent, to make every effort to find acts of the General Assembly constitutional. Citizens and organizations have expended a vast amount of effort and resources in anticipation of the referendum, and we take no pleasure in holding the referendum unconstitutional. Although we may view the task with disfavor, and may have varying personal views on the merits of the controversy that surrounds video gaming, we cannot ignore precedent and our duty to interpret the constitution.

s/ Ernest A. Finney, Jr. C.J.
s/ Jean H. Toal A.J.
s/ James E. Moore A.J.
s/ E.C. Burnett, III A.J.
s/ William T. Howell A.A.J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joytime Distributors and Amusement Co., Inc.,
Plaintiff,

v.

The State of South Carolina,
Defendant.

ORDER

Entered: October 20, 1999

On October 14, 1999, this Court issued Opinion No. 25007 in the above entitled matter. Joytime Distributors and Amusement Co., Inc., has filed a petition for rehearing. Additionally, amicus curiae PedroLand, Inc., has filed a request that the Court clarify its opinion, and John D. Marlow seeks permission to appear as amicus curiae.

The petition for rehearing is denied. The requests by PedroLand, Inc., and John D. Marlow are also denied.

IT IS SO ORDERED.

\S\ _____ C.J.
\S\ _____ A.J.
\S\ _____ A.J.
\S\ _____ A.J.
\S\ _____ A.A.J.

Columbia, South Carolina
October 20, 1999

SOUTH CAROLINA BILL TEXT

SC **H 3834 (R212, H3834)**

VERSION: Enacted July 2, 1999 Robinson

AN ACT TO AMEND SECTIONS 12-21-2710, AS AMENDED, 12-21-2712, 12-21-2720, AMENDED, AND 12-21-2726, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO COIN-OPERATED MACHINES OR DEVICES, SO AS TO EXTEND THE PROHIBITION ON SLOT MACHINES AND OTHER MACHINES OR DEVICES PERTAINING TO GAMES OF CHANCE TO VIDEO GAMES WITH A FREE PLAY FEATURE OR ANY OTHER COIN-OPERATED MACHINE OR DEVICE USED FOR GAMBLING, TO EXTEND THE SEIZURE AND DESTRUCTION PROVISIONS APPLICABLE TO GAMES OF CHANCE TO THESE EXPANDED PROHIBITIONS, TO CONFORM EXISTING LICENSING REQUIREMENTS FOR COIN-OPERATED MACHINES AND DEVICES TO THESE EXPANDED PROHIBITIONS AND TO DELETE REFERENCES TO PROVISIONS OF LAW REPEALED BY THIS SECTION; TO AMEND SECTION 12-54-40, AS AMENDED, RELATING TO TAX CRIMES AND PENALTIES, SO AS TO DELETE THE OFFENSE OF OPERATING AN UNMETERED VIDEO GAME WITH A FREE PLAY FEATURE; TO AMEND SECTIONS 16-19-40 AND 16-19-50, RELATING TO THE OFFENSE OF GAMBLING, SO AS TO EXTEND THESE OFFENSES SPECIFICALLY TO PLAYING OR MAINTAINING ANY LICENSED COIN-OPERATED MACHINE OR DEVICE USED FOR GAMBLING PURPOSES; AND TO REPEAL SECTIONS 12-21-2703, 16-19-60, AND ARTICLE 20, CHAPTER 21 OF TITLE 12 RELATING RESPECTIVELY TO THE RETAIL LICENSE REQUIREMENT FOR A LOCATION WITH VIDEO

GAMES WITH A FREE PLAY FEATURE, THE EXEMPTION OF VIDEO GAMES WITH A FREE PLAY FEATURE FROM THE GAMBLING OFFENSES, AND THE VIDEO GAMES MACHINES ACT, ALL OF THE ABOVE ENACTED FOR THE PURPOSE OF PROHIBITING CASH PAYOUTS FOR CREDITS EARNED ON VIDEO GAME MACHINES ON AND AFTER JULY 1, 2000; TO PROVIDE FOR A STATEWIDE REFERENDUM ON NOVEMBER 2, 1999, TO ASCERTAIN WHETHER OR NOT THE QUALIFIED ELECTORS OF THIS STATE DESIRE THAT CASH PAYOUTS FOR CREDITS EARNED ON VIDEO GAME MACHINES SHALL CONTINUE TO BE ALLOWED AFTER JUNE 30, 2000, AND TO PROVIDE A LICENSE FEE SURCHARGE ON EXISTING MACHINES TO PAY FOR THIS REFERENDUM, TO PROVIDE THAT IF THE QUALIFIED ELECTORS VOTE TO CONTINUE TO PERMIT SUCH CASH PAYOUTS, THE ABOVE ENACTED PROVISIONS PROHIBITING PAYOUTS SHALL NOT TAKE EFFECT AND INSTEAD THAT TITLE 12 OF THE 1976 CODE RELATING TO TAXATION SHALL BE AMENDED BY ADDING CHAPTER 22 SO AS TO PROVIDE FOR THE REGULATION, LICENSING, TAXATION, AND CIVIL AND CRIMINAL ENFORCEMENT OF VIDEO GAME MACHINES WITH A FREE PLAY FEATURE, ARCADE GAME MACHINES, AND OTHER DEVICES INCLUDING PROVISIONS TO VEST PRIMARY ENFORCEMENT AND REGULATORY POWERS IN THE DEPARTMENT OF REVENUE AND THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, TO PROVIDE FOR LICENSE FEES ON MACHINE MANUFACTURERS, DISTRIBUTORS, AND OWNERS TO PROVIDE LICENSE FEES FOR MACHINES AND FOR THE LICENSING OF OPERATORS AND ESTABLISHMENTS, TO PROVIDE FOR AN IMPOSITION OF TAXES ON NET MACHINE INCOME,

TO PROVIDE FOR THE USE OF REVENUES GENERATED BY THIS CHAPTER, TO PROVIDE FOR LOCATION AND OTHER RESTRICTIONS, NEW CASINO PROHIBITIONS AND THE PHASING OUT OR CONTINUATION OF EXISTING CASINOS UNDER CERTAIN CONDITIONS, TO PROVIDE FOR PUBLIC NOTICE AND OTHER NOTIFICATION PROVISIONS, TO PROVIDE FOR THE MANNER IN WHICH AND REQUIREMENTS UNDER WHICH THESE MACHINES MAY BE PLAYED INCLUDING PROHIBITING THE OFFERING OF INDUCEMENTS, THE REGULATION OF ADVERTISING, AND CERTAIN LIMITATIONS ON BETS AND PAYOUTS, TO PROVIDE FOR TECHNICAL STANDARDS AND SPECIFICATIONS FOR THESE MACHINES AND THEIR EQUIPMENT INCLUDING TEMPORARY STANDARDS UNTIL THE DEPARTMENT OF REVENUE ADOPTS PERMANENT STANDARDS UNDER THIS CHAPTER, TO PROVIDE FOR BACKGROUND INVESTIGATIONS AND THE ACTIONS THAT MAY BE TAKEN AS A RESULT OF THE BACKGROUND INVESTIGATIONS, TO PROVIDE CIVIL AND CRIMINAL PENALTIES AND REMEDIES FOR CERTAIN VIOLATIONS INCLUDING LICENSE REVOCATIONS, TO PROVIDE FOR THE MANNER IN WHICH COUNTIES AND MUNICIPALITIES MAY ALSO IMPOSE LICENSE FEES AND ZONING RESTRICTIONS ON THESE MACHINES, AND TO PROVIDE FOR SEPARATE REQUIREMENTS FOR THE REGULATION, LICENSING, AND ENFORCEMENT OF ARCADE GAME MACHINES AND OTHER AMUSEMENT DEVICES INCLUDING A PROVISION THAT PROHIBITS CASH PAYOUTS, THAT SECTION 12-54-40 SHALL BE AMENDED RELATING TO TAX CRIMES AND PENALTIES SO AS TO FURTHER PROVIDE FOR PENALTIES IN REGARD TO CERTAIN ACTIONS REQUIRED OR PROHIBITED UNDER CHAPTER 22 OF TITLE 12, THAT SECTION 16-19-60

SHALL BE AMENDED RELATING TO CERTAIN GAMBLING OFFENSES SO AS TO DELETE REFERENCES TO THE REGULATION OF VIDEO GAME MACHINES AND PAYOUTS, THAT SECTION 61-4-580 SHALL BE AMENDED, RELATING TO PROHIBITED ACTS REGARDING BEER AND WINE, SO AS TO PROVIDE THAT ACTIVITIES AUTHORIZED BY CHAPTER 22 OF TITLE 12 ON THE PREMISES OF ESTABLISHMENTS LICENSED TO SELL BEER AND WINE ARE NOT A PROHIBITED ACT, THAT SECTIONS 16-19-65, 16-19-66, AND 16-19-67 SHALL BE ADDED SO AS TO MAKE IT UNLAWFUL FOR ANY PERSON TO KEEP CERTAIN TYPES OF GAME OR SLOT MACHINES ON HIS PREMISES, TO MAKE IT UNLAWFUL FOR ANY PERSON TO OPERATE SUCH MACHINES, TO MAKE IT UNLAWFUL FOR ANY PERSON TO CHEAT OR DEFRAUD THE OWNER OF A LAWFUL MACHINE OF ITS CONTENTS, TO PROVIDE PENALTIES FOR VIOLATIONS AND AUTHORIZE THE SEIZURE OF UNLAWFUL MACHINES, AND THAT ARTICLE 19, CHAPTER 21 OF TITLE 12 RELATING TO COIN-OPERATED MACHINES, DEVICES, AND OTHER AMUSEMENTS AND ARTICLE 20, CHAPTER 21 OF TITLE 12 RELATING TO THE VIDEO GAME MACHINES ACT SHALL BE REPEALED; TO PROVIDE THAT CERTAIN VIDEO GAME MACHINE STANDARDS AND REQUIREMENTS CONTAINED IN CHAPTER 22 OF TITLE 12 TAKE EFFECT JULY 1, 1999, AND CERTAIN CASINO PROVISIONS CONTAINED IN CHAPTER 22 OF TITLE 12 TAKE EFFECT JUNE 1, 1999; TO PROVIDE FOR THE MANNER IN WHICH EXISTING VIDEO GAME MACHINE LICENSE FEES SHALL BE PHASED INTO THE PROPOSED NEW LICENSE STRUCTURE; TO ADD SECTION 12-21-2805 SO AS TO AUTHORIZE ENFORCEMENT ACTIONS FOR VIOLATIONS OF SPECIFIED VIDEO GAME MACHINE LAWS BY THE DEPARTMENT OF

REVENUE, STATE LAW ENFORCEMENT DIVISION, OR THE ATTORNEY GENERAL OR BY A PERSON WITH KNOWLEDGE OF THE VIOLATION IF THE DEPARTMENT, DIVISION, OR ATTORNEY GENERAL DECLINES, AND TO PROVIDE THE PROCEDURES FOR AND REMEDIES FOR SUCH VIOLATIONS; AND TO ADD SECTION 32-1-60 SO AS TO PROVIDE THAT EXISTING PROVISIONS OF LAW ALLOWING PERSONS TO SUE TO RECOVER GAMBLING LOSSES ONLY APPLY TO GAMBLING ACTIVITIES NOT AUTHORIZED BY LAW.

TEXT:

Be it enacted by the General Assembly of the State of South Carolina:

PART I

Prohibition on Payouts

Other gambling machines unlawful

SECTION 1. Section 12-21-2710 of the 1976 Code, as amended by Act 155 of 1997, is further amended to read:

> "Section 12-21-2710. It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for

gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both."

Seizure and destruction of other unlawful machines

SECTION 2. Section 12-21-2712 of the 1976 Code is amended to read:

"Section 12-21-2712. Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be

immediately destroyed."

Revision of licensing provisions

SECTION 3A Section 12-21-2720(A)(3) of the 1976 Code, as last amended by Section 148, Act 181 of 1993, is further amended to read:

"(3) a machine of the nonpayout type, or in-line pin game, operated by a slot in which is deposited a coin or thing of value except machines of the nonpayout pin table type with levers or 'flippers' operated by the player by which the course of the balls may be altered or changed."

B. Section 12-21-2720(C) of the 1976 Code, as last amended by Act 145 of 1995, is further amended to read:

"(C) The owner or operator of any coin-operated device subject to licensing under Section 12-21-2720(A)(3) and which has multi-player stations, shall purchase a separate license for each such station."

C. Section 12-21-2720 of the 1976 Code, as last amended by Act 155 of 1997, is further amended by deleting subsections (E) and (F), which read:

"(E) The department shall not issue a license for the operation of a video game with a free play feature which is located or intended to be located on a watercraft or vessel plying the territorial waters of this State.

(F) Four hundred dollars of the four

thousand dollar license fee imposed in subsection (A) may be retained by the department and expended in budgeted operations for the implementation and ongoing operation of the monitoring system required by law or in other programs and services as the director may determine necessary and appropriate."

Revision of display and linkage provisions

SECTION 4. Section 12-21-2726 of the 1976 Code, as last amended by Act 164 of 1993, is further amended to read:

"Section 12-21-2726. Every person who maintains for use or permits the use of, on a place or premises occupied by him, a machine subject to the license imposed by this article by way of proof of licensing must have a current license displayed conspicuously on the front of the machine."

Other gambling machines included in prohibition

SECTION 5. Section 16-19-40 of the 1976 Code is amended to read:

"Section 16-19-40. If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or openplace at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or

by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense."

Offense deleted

SECTION 6. Section 12-54-40 of the 1976 Code, as last amended by Act 155 of 1997, is further amended by deleting subsection (M) which reads:

"(M) A machine owner or distributor, as defined in Article 20, Chapter 21 of this title, who allows or causes a machine to be operated without a metering device, or who wilfully places a machine on location or who wilfully allows or causes a machine to be operated with a metering device that does not

accurately record the information required under Article 20, Chapter 21 of this title is guilty of a felony and, upon conviction, must be imprisoned for not less *than one year nor* more than ten years, without benefit of probation, parole, or suspension of sentence, and in addition may be fined not more than twenty-five thousand dollars."

Other gambling machines included in prohibition

SECTION 7. Section 16-19-50 of the 1976 Code is amended to read:

"Section 16-19-50. Any person who shall set up, keep, or use any (a) gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (b) roley-poley table, (c) table to play at rouge et noir, (d) faro bank (e) any other gaming table or bank of the like kind or of any other kind for the purpose of gaming, or (f) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes except the games of billiards, bowls, chess, draughts, and backgammon, upon being convicted thereof, upon indictment, shall forfeit a sum not exceeding five hundred dollars and not less than two hundred dollars."
Repeal

SECTION 8. Sections 12-21-2703 and 16-19-60 and Article 20, Chapter 21 of Title 12, all of the 1976 Code, are repealed.

PART II

Referendum

Referendum

SECTION 9. (1) A statewide referendum must be conducted November 2, 1999, to ascertain whether or not video game machine payouts will continue to be allowed in this State. The State Election Commission shall place the exact question contained in item (2) of this subsection on the referendum ballot. The state election laws shall apply to the referendum, mutatis mutandis. The State Board of Canvassers shall publish the results of the referendum and certify them to the Secretary of State, the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Code Commissioner.

(2) The question put before the qualified electors in the referendum shall read:

"Shall cash payouts for credits earned on video game machines continue to be allowed after June 30, 2000?

Yes [ ]

No [ ]

Those voting in favor of the question shall deposit a ballot with a check or cross mark in the square after the word 'Yes', and those voting against the question shall deposit a ballot with a check or cross mark in the square after the word 'No'."

(3) The State Election Commission shall

place the following explanation of the referendum question on the ballot:

> "A majority 'yes' vote shall mean that cash payouts for credits earned on video game machines shall continue to be allowed, with an increase in the legal payout to $500 per payout and with additional taxes and regulation.
>
> A majority 'no' vote shall mean that cash payouts for credits earned on video game machines shall not be allowed after June 30, 2000."

(4) In addition to all license taxes and fees imposed by the State on video games with a free play feature pursuant to Section 12-21-2720(A)(3) of the 1976 Code imposing such licenses and fees, there is imposed a one-time surcharge license fee of fifty dollars for each such licensed machine due and payable to the Department of Revenue on or before September 1, 1999. Failure to remit the surcharge in a timely manner is deemed failure to pay the license tax imposed pursuant to Section 12-21-2720(A)(3). The revenues of this fee shall be used to defray the expenses of the statewide referendum required by this act.

PART III

Coin-Operated Machines Regulation, Taxation and Enforcement Regulation, taxation, and enforcement of coin-operated machines

SECTION 10. Title 12 of the 1976 Code is amended by adding:

"CHAPTER 22

Coin-Operated Machines and Other Devices

Article 1

General Provisions

Section 12-22-10. As used in this chapter, unless the context clearly requires otherwise:

(1) Director' means the Director of the Department of Revenue.

(2) 'Chief' means the Chief of the South Carolina State Law Enforcement Division.

(3) 'Division' means the South Carolina State Law Enforcement Division.

(4) 'Associated equipment' means parts and components that affect win and loss or that communicate, display, or affect the number of credits won, lost, or played.

(5) 'Background investigation' means the investigation conducted in accordance with Article 13 of this chapter.

(6) 'Central computer monitoring system' or similar term means the computing system administered by the department for communicating with and retrieving information from machines, and activating and disabling machines.

(7) 'Contraband machine,' or 'contraband device,' means a machine, location controller or its modem, the computer chips of a machine or location controller, or any other part of the machine, location controller or modem not meeting the requirements of this chapter. A 'machine' that does not meet the requirements of this chapter

is a 'contraband machine' regardless of whether the machine issues payout tickets redeemable for cash.

(8) 'Disable' or 'disabling' means the process of executing a command from the central computer monitoring system or the location controller which causes a machine to cease functioning.

(9) 'Distributor' means any person who sells, buys and sells, gives, loans, or is the lessee or the lessor of machines. A distributor may also:

(a) service or repair machines in this State;

(b) own machines which are not placed into operation in an establishment without obtaining a machine owner's license;

(c) own machines which are placed into operation in an establishment only if a machine owner's license is obtained; and

(d) operate machines which are placed into operation in an establishment only if a machine operator's license is obtained.

(10) 'Establishment' or 'location' means premises with machines.

(11) 'Gross machine income' means the amount of money that goes into the machine.

(12) 'Machine' means a nonpayout electronic machine with a free play feature that, upon insertion of cash or coin, is available to play or simulate the play of

games utilizing a video display and microprocessors, in which the player may receive free games or credits that are redeemed for cash except as prohibited by this chapter. Each player station of a multi-player unit is a separate machine.

(13) 'Machine owner' means any person, other than a distributor, who owns one or more machines.

(14) 'Machine operator' means any person who owns, operates, or manages an establishment with one or more machines.

(15) 'Manufacturer' means any person that manufactures, assembles, or programs machines or controllers for sale or use in this State.

(16) 'Net machine income' means the amount of money that goes into the machine less payouts.

(17) 'Payback' means the theoretical percentage of return to a player.

(18) 'Payout' means the total amount a player is paid at the end of a play period, regardless of the amount the player has deposited in the machine.

(19) 'Person' means any individual, partnership, corporation, association, entity, or organization of any type.

(20) 'Play period' means the period of time from when money is put into the machine until payout.

(21) 'Player' means a person who participates in the playing of a machine.

(22)(a) 'Principal' means:

(i) every person;
(ii) an association;

(iii) all partners of a partnership, limited partnership, or limited liability partnership;

(iv) all members of a limited liability company, or if the company is a manager managed company, all members and managers;

(v) trust and its beneficiaries;

(vi) corporation, its directors, officers, and stockholders with a ten percent or more direct or beneficial interest or any person or entity that receives more than ten percent of the net income; or

(vii) an employee who has day-to-day operational management responsibilities for the business or entity; which has or will have a direct or indirect ownership interest in a machine or machines, a manufacturer, a machine owner, distributor, a machine operator or the establishment for which the applicant seeks a new or renewal license.

(b) 'Indirect ownership interest' includes, but is not limited to, a loan or extension of credit or forgiving of a loan of ten thousand dollars or more, made to or for the benefit of an

applicant or licensee. 'Indirect ownership interest' does not include a loan or extension of credit made by a state or federally chartered financial institution or a restricted or supervised lender licensed under South Carolina law. Multiple loans of less than ten thousand dollars may not be used to evade the requirements of this chapter and such activity is grounds for revocation of any and all licenses issued pursuant to Section 12-22-320 held by the applicant.

(c) If a corporation is a member of a controlled group of corporations, as defined in 26 U.S.C. 1563, or a member of an affiliated group of corporations, as defined in 26 U.S.C. 1504, and at least one member of the group of corporations is a publicly-held corporation, then only the corporation which engages in the business or activity required to be licensed pursuant to this chapter is considered a principal for purposes of this chapter, along with its directors, officers, and stockholders as described in subitem (a)(vi).

(d) For purposes of item (c) of this subsection, 'publicly held corporation' means a corporation:

(i) – whose shares are traded on a national exchange; and

(ii) whose total assets at the end of the

corporation's most recent fiscal quarter exceeded one billion dollars.

(23) 'Records' means all paper or electronic accounts, bank account records, financial statements, business records, contracts, reports and returns, including tax information and returns, and other information the department or division reasonably considers necessary to administer and enforce the provisions of this chapter.

(24) 'Video Game Machine Identification Number' or 'VGMID' means the permanently assigned unique number issued by the department to identify a specific machine from first delivery in this State until destruction or removal from this State.

Section 12-22-20. (A) Unless specifically granted to the division, the department has all powers necessary and proper to execute fully and effectively the provisions of this chapter including, but not limited to, the power:

(1) to require any person to submit any information necessary to effectively administer and enforce the provisions of this chapter;

(2) to prescribe the forms which must be used by any licensee involved in the manufacturing, ownership, distribution or operation of machines or an establishment or other coin-operated devices licensed pursuant to this chapter;

(3) to suspend any license authorized by this chapter without notice or hearing upon a determination that a licensee is

willfully violating the provisions of this chapter, prima facie evidence of which is sufficient after written notice by the department has been sent to the licensee regarding a violation of this chapter and the violation has not been cured within a reasonable time as directed by the department in that written communication; any suspension must remain in effect until the department determines that the cause for the suspension has been cured or abated; a license may be revoked upon a determination that the licensee has not made satisfactory progress to implement necessary corrective measures;

(4) to suspend any license authorized by this chapter without notice or hearing upon a determination that the safety or health of patrons or employees is jeopardized by the licensee or the condition of the licensee's facilities; any suspension must remain in effect until the department determines that the cause for the suspension has been abated; a license may be revoked upon a determination that the licensee has not made satisfactory progress toward abating the hazard;

(5) to adopt regulations in accordance with the Administrative Procedures Act; and

(6) to take any other action as may be reasonable or appropriate to enforce this chapter.

(B) Notwithstanding subsection (A), any law enforcement officer has the authority to enforce any criminal provision of this chapter.

Section 12-22-30. Except as provided in Section 12-54-240, any information obtained by the department or division in the administration and enforcement of the provisions of this chapter is public information, except for proprietary information. The department may disclose information to the division and to other governmental entities in and outside of this State.

Section 12-22-40. The department has sole and exclusive power to issue all licenses provided for in this chapter. The department has exclusive authority to establish the conditions or restrictions necessary for issuing, suspending, or revoking a license.

Section 12-22-50. The department may issue subpoenas requiring the attendance of witnesses and the production of records, memoranda, papers, and other documents and administer oaths and take testimony thereunder.

Section 12-22-60. All fees, taxes, and penalties imposed in this chapter are a first lien upon any and all property of the person charged therewith.

Section 12-22-70. All records of a licensee must be kept in the manner prescribed by the department. All records shall be retained for at least the period for which taxes may be assessed under Section 12-54-85.

Section 12-22-80. All applicants and their principals shall provide access for the department and division to all of the applicant's financial records pertaining to the financing of the applicant in order to evaluate statements and documentation supplied with the application in connection with background investigations.

Section 12-22-90. (A) The director, the employees of

the department, the chief, and the employees of the division, may not directly or indirectly, individually, or as a member of a partnership, or as a shareholder with a one percent or more direct or beneficial interest in a corporation, have a financial or ownership interest in:

(1) a testing laboratory chosen by the department pursuant to this chapter Section 12-22-960;
(2) a machine;
(3) a machine owner;
(4) a machine operator;
(5) a manufacturer;
(6) a distributor; or
(7) an establishment.

(B) The director, the employees of the department, the chief, and the employees of the division may not directly or indirectly receive income from, receive a loan fund from, or be forgiven from repaying any loan from a testing laboratory or any person or business entity issued a license pursuant to Section 12-22-320.

Article 3

Licensure

Section 12-22-310. (A) Before a machine or associated equipment is manufactured, distributed, sold, or placed for use in this State, the machine owner, machine operator, manufacturer, distributor, and establishment must be licensed by the department as provided for in this chapter.

(B) Before placement or operation, a machine must be licensed.

(C) Licenses issued as provided for in this chapter

are the property of the department and must not be transferred, assigned to another person, or pledged as collateral, except as otherwise provided in this chapter. Any transfer of a business, or a change of ownership, possession, or control of an interest in a business holding a license issued under Section 12-22-320 must be conducted in accordance with Section 12-22-350. Any transfer of a machine, or a change of ownership, possession, or control of a machine licensed under Section 12-22-330 must be conducted in accordance with Section 12-22-350.

Section 12-22-320. (A)(1) Every two years a manufacturer, distributor, machine owner, machine operator, and establishment, engaging in business in this State, shall apply for and obtain from the department a license for the privilege of engaging in the business and shall pay the nonrefundable fee levied at the time of license application. The fees are as follows:

(a) manufacturer, ten thousand dollars;

(b) distributor, ten thousand dollars; and

(c) owner, two thousand dollars.

(2) There is no licensing fee imposed upon:

(a) a person licensed as a machine operator; or

(b) an establishment.

(B)(1) A licensed manufacturer who is also engaged in business as a machine owner, distributor, or machine operator, shall obtain a separate license for each activity for which a license is required.

(2) A licensed machine owner who is also engaged in business as a manufacturer, distributor, or machine operator, shall obtain a separate license for each activity for which a license is required.

(3) A licensed distributor who is also engaged in business as a manufacturer, machine owner, or machine operator, shall obtain a separate license for each activity for which a license is required.

(4) A machine operator may operate more than one establishment under the same machine operator's license but shall obtain a separate establishment license for each establishment in which machines are maintained.

(5) Each licensed establishment shall have a licensed machine operator.

(C) At the time of filing the application for a license, the applicant must pay the fee imposed pursuant to subsection (A).

(D) Biennial licenses issued under this chapter for machine owners, machine operators, distributors, and manufacturers expire according to the county of the licensee's principal place of business. For nonresident licensees, licenses expire according to the county where the licensee's registered agent is located. For establishments, the license expires according to the county where the establishment is located. The expiration dates are the last day of:

(1) February in years which end in an:

(a) odd number for Allendale, Bamberg, Barnwell, Beaufort, and Berkeley Counties;

(b) even number for Charleston, Clarendon, Colleton, Dorchester, Georgetown, Hampton, Jasper, and Williamsburg Counties;

(2) May in years which end in an:

(a) odd number for Cherokee, Chester, Chesterfield, Darlington,

Dillon, Fairfield, Florence, and Horry Counties;

(b) even number for Lancaster, Marion, Marlboro, Union, and York Counties;

(3) August in years which end in an:

(a) odd number for Calhoun, Kershaw, Lee, Orangeburg, and Sumter Counties;

(b) even number for Richland County;

(4) November in years which end in an:

(a) odd number for Abbeville, Aiken, Anderson, Edgefield, Greenville, and Greenwood Counties;

(b) even number for Laurens, Lexington, McCormick, Newberry, Oconee, Pickens, Saluda, and Spartanburg Counties.

If a license purchased will be for less than twenty-three months because of this section, the license tax must be prorated on a twenty-four month basis with each month representing one twenty-fourth of the license fee imposed under subsection (A).

(E) The department, at its discretion and for the efficient administration of the law, may prorate licenses in any manner to implement or change the expiration date established in this section and to stagger the issuance of the licenses by county or by any other method considered

appropriate by the department.

(F) A license authorized in this section shall not be issued unless and until the department has completed its background investigation.

(G) An application for a license may be denied or a license may be revoked if the applicant or licensee fails to pay any tax or fee administered by the department.

(H) A license issued under this chapter is a privilege personal to the person to whom it was issued and is not a legal right.

Section 12-22-330. (A)(1) Every machine owner making a machine available for play shall apply for and procure a license from the department for the privilege of making use of the machine in this State.

(2) The machine owner shall pay a biennial fee of four thousand dollars for each machine license. The machine owner shall apply for and obtain from the department the license required by this section before the first day of June every two years or before doing an act taxable under this chapter. All licenses expire May thirty-first the second year of which the license is valid following the date of issue.

(3) A license for a machine shall be issued only to a person who has been licensed pursuant to Section 12-22-320 for use at a licensed establishment. No machine may be operated without a license.

(B) As an alternative to the license required in subsection (A), a person may be granted a nonrefundable license beginning April first and to expire September thirtieth, following the date of issue, which may not be

prorated. The fee for this six-month license is one-fourth the biennial license fee.

(C) If a license required in subsection (A) is purchased after June thirtieth, the license tax must be prorated on a twenty-four month basis with each month representing one twenty-fourth of the license fee imposed under subsection (A).

(D) The owner or operator of any machine which has multi-player stations shall purchase a separate license for each such station and any such multi-player station counts as a machine or device when determining the number of machines or devices authorized for licensure under this chapter.

(E) A license may not be issued for the operation of a machine that is located, or intended to be located, on a watercraft or vessel plying the territorial waters of this State.

(F) No machine may be operated at an establishment unless the establishment is licensed pursuant to the provisions of Chapter 36 of Title 12.

(G) Upon application being made for a license to operate any machine or apparatus under this chapter, the department may presume that the operation of the machine or apparatus is lawful and when a license has been issued for the operation thereof, the sum paid for the license may not be refunded notwithstanding that the operation of the machine or apparatus is prohibited.

(H) The issuance of a license under the provisions of this chapter by the department does not make lawful the operation of any gambling machine or device, the operation of which is made unlawful under the laws of this State.

(I) Failure to obtain a machine license as required by this chapter makes the machine owner liable for the penalties imposed in this chapter.

(J) A person with a license issued pursuant to this chapter shall notify the department within thirty days of any change in its principals. Any addition to the machine owner's principals of a person not already determined to have met the qualifications of this chapter voids the license unless the addition has been approved in advance by the department. The department shall develop forms and procedures for notification and approval of any change.

(K) No distributor, owner, or operator must be issued a license unless the distributor, owner, or operator has been a resident of the State for two years before the date of application. If the distributor, owner, or operator has more than one principal, then only the principal in whose name the license is issued as provided in Section 12-22-1110(A)(2) must be a resident of the State for two years before the date of application.

Section 12-22-340. (A) No municipality may limit the number of machines within the boundaries of the municipality. A municipality may by ordinance impose a license fee on machines, other than those referred to in Article 15, in an amount not exceeding ten percent of three thousand six hundred dollars of the license fee imposed pursuant to Section 12-22-330(A) for the equivalent license period.

(B) No county may limit the number of machines within the boundaries of a county. A county may by ordinance impose a license fee on machines, other than those referred to in Article 15, located in an unincorporated area of the county in an amount not exceeding ten percent of three thousand six hundred dollars of the license fee imposed

pursuant to Section 12-22-330(A) for the equivalent license period.

Section 12-22-350. (A)(1) The department and the division must be given within ten business days written notice of:

> (a) any termination of a business, transfer of a business, or a change of ownership, possession, or control of an interest in a business holding a license issued under Section 12-22-320; and
>
> (b) any transfer of a machine, or a change of ownership, possession, or control of a machine licensed pursuant to Section 12-22-330.

(2) The transfer of ten percent or more of a sole proprietorship, partnership interest, limited partnership interest, or corporate stock is considered a change in ownership. An indirect ownership interest that would compel the disclosure and background information required of a principal for an initial application must be disclosed to the department pursuant to this provision.

(3) Anyone whose interest in the business has ended must immediately surrender to the department any licenses in his possession related to that business or machine. Failure to surrender a license as required by this subsection is justification for revocation of any and all licenses issued by the department and held by the licensee.

(B)(1) A person who acquires an interest in a business which holds licenses issued under this chapter, upon initiating the application process for a biennial license issued under 12-22-330, may be issued a temporary license by the

department at the time of the acquisition if the applicant or location for which the temporary license is sought is not considered by the department to be ineligible under the provisions of this chapter or the applicant currently holds a valid license previously issued pursuant to this chapter, or the applicant has had a criminal history background check conducted by the division within the past thirty days.

(2) A temporary license issued pursuant to item (1) of this subsection is valid until a biennial license is approved or disapproved by the department, but in no case is it valid for more than one hundred eighty days from the date of issuance. The department may revoke a temporary license if the applicant fails to pursue the biennial license in a timely manner. The department shall collect a fee of twenty-five dollars for each temporary license.

(C)(1) Following notice as provided in subsection (A), a machine license issued pursuant to Section 12-22-330 may be transferred from one person licensed pursuant to Section 12-22-320 to another person licensed pursuant to Section 12-22-320. Any machine license transferred in accordance with this subsection shall remain in effect for the remainder of the period for which the license was issued to the transferor. All records relating to the ownership of the machine shall be revised to the reflect the identity of the new owner.

(2) A machine license shall not be transferred to any person who is not licensed pursuant to Section 12-22-320.

(3) If a machine is proposed to be transferred to a person who is not licensed pursuant to this chapter, then the machine shall not be used in an establishment until the transferee is licensed as a machine owner pursuant to this chapter.

Section 12-22-360. Appeals of department decisions, including appeals of penalties, or of denied, suspended, or revoked licenses, must be conducted in accordance with the South Carolina Revenue Procedures Act in Chapter 60 of this title.

Article 5

Imposition of Tax on Net Machine Income

Section 12-22-510. (A) In addition to the license fees, a tax of twenty-five percent of the net machine income of every machine is imposed on the machine owner.

(B) The tax imposed by this section must be collected and remitted to the department by the machine owner. The machine owner shall be responsible for collecting and remitting any portion of the tax imposed by this section which is agreed in any manner to be paid by any other person, including the machine operator, distributor, or the owner, lessee, or manager of an establishment at which the machine is operated or offered for operation.

(C) The tax imposed by this section is effective beginning on the first day of the first month following the effective date of this chapter.

Section 12-22-520. (A) Unless the department exempts a taxpayer from this requirement, the taxes in this article must be paid to the department by the machine owner through electronic transfer of funds. The machine owner shall furnish the department all information and bank authorization required to facilitate the timely payment of taxes due to the State. Machine owners shall provide the department thirty days' advance notice of any proposed bank account changes to ensure the uninterrupted electronic

transfer of funds.

(B) After notice to taxpayers, the department may draw upon the designated account to satisfy the tax indebtedness under this chapter on the twentieth day of the month following the month for which taxes accrued. The machine owner shall maintain an account balance in an amount sufficient to cover the amount drawn by the department. The failure to maintain an adequate balance in the account as required in this section authorizes the department to find the tax in jeopardy and to disable all licensed machines of the machine owner. Appeals are governed by the jeopardy assessment appeals procedures in Sections 12-60-910 and 12-60-920.

(C) Each machine owner, machine operator, and licensed establishment shall report to the department for each calendar quarter, by the twentieth of the month following end of the quarter, the following information for each machine:

(1) name and address of location of the machine;

(2) denomination, whether five cents, etc. of the game;

(3) the name of the game;

(4) the name of the individual(s) collecting money from the machine and the owner of the machine;

(5) the date(s) of collection;

(6) the date of previous collection;

(7) income number at commencement of the reporting period;

(8) income number at the end of the reporting period;

(9) beginning payout number;

(10) ending payout number;

(11) payout to players;

(12) gross profit;

(13) the percentage of net profits divided between owner and the location and the formula by which those figures are calculated; and

(14) the name, address, telephone number, and information regarding any refunds to players.

(D) For purposes of the reporting requirements of this section, a person who has a security interest, lease agreement, or similar financing arrangement in a machine is not considered a machine owner.

(E) For machines connected to the central computer monitoring system, the department shall determine the tax on net machine income as of the last day of each month. The department shall notify the machine owner in the form of a billing statement of the amount of tax the department shall draw from the designated account to satisfy the net machine income tax.

Section 12-22-530. (A) On or before the twentieth day of the month following the end of each month, every person subject to the tax imposed by this section shall render to the department, on a form or in a manner prescribed by it, the tax due and payable and a true and correct statement showing the net machine income for the reporting period together with other information the department may require. A return is timely filed if the return is mailed and postmarked on or before the due date.

(B) As an interim procedure to collect the taxes in this article between the effective date of this chapter and when a machine is connected to the central computer monitoring system, the department shall develop forms and

procedures to facilitate the return and payment of these taxes. This interim procedure also must be used during any period when the central computer monitoring system is unable to determine taxes as provided in Section 12-22-520. The taxes are due and payable and the return is due on or before the twentieth day of the month following the month in which the taxes accrue.

Section 12-22-540. (A) The taxpayer shall report to the department any discrepancies in the department's statement of taxes based on a machine's mechanical and electronic meter readings, or otherwise. The owner shall submit to the department the maintenance log that includes current mechanical meter readings and the audit ticket that contains electronic meter readings generated by the machine's software for each machine that reflects a discrepancy. Until a discrepancy is resolved, the department shall not make credit adjustments. Electronic accounting meters shall not be cleared outside the presence of an authorized department or division employee. Any discrepancies that cannot be resolved because of unauthorized meter clearing shall be resolved in favor of the State. The burden of proving a discrepancy is upon the taxpayer.

(B) A licensed establishment may return to a player money which the player deposited into the machine for which the machine did not permit play and would not print a validated payout ticket; and in this event shall obtain and record the date, time, amount, and licensed machine number of the refund, and the name, addresses, telephone number, social security number, and driver's license identification number and state, of that player. Thereafter, the taxpayer may file a claim for refund for any taxes paid under this chapter on the amount returned to the player in accordance with Chapter 60 of this title, but in addition to the information required by Section 12-60-470, the taxpayer

shall file the information required to be maintained by the licensed establishment under this subsection.

Section 12-22-550. Failure to remit taxes imposed under this chapter shall result in immediate disabling of the machines and is justification for the revocation of the machine license and machine owner's license.

Section 12-22-560. (A) All revenue derived from the tax imposed pursuant to Section 12-22-510, except as herein provided, must be credited to a fund separate and distinct in the general fund to be known as the Video Machine Income Fund. No appropriations credited to this fund may be authorized prior to July 1, 2000.

(B) Until June 30, 2000, the department may retain six hundred dollars per machine license fee to be expended as follows: four hundred dollars per machine license fee shall be expended by the department and used exclusively for administration and enforcement ofthis chapter, and two hundred dollars per machine license fee shall be transferred to the division and used exclusively for administration and enforcement of this chapter. Beginning July 1, 2000 and effective beginning with the general appropriation act for the fiscal year 2000-2001, the General Assembly in the annual general appropriation act shall appropriate to the department funds in an amount not to exceed four hundred dollars per machine license fee to be used exclusively for administration and enforcement of this chapter.

Article 7

Location Restrictions, Public Notice, and Signage

Section 12-22-710. (A) A licensed establishment, including its employees and agents, may not:

(1) maintain, possess, or otherwise allow on its premises more than five machines, except as provided in section 12-22-740 ;

(2) advertise, or allow advertising, in any manner for the playing of the machines, except as provided in Section 12-22-760;

(3) offer or allow to be offered any inducement to a person for the playing of machines;

(4) allow anyone under the age of twenty-one to play machines;

(5) allow anyone under the age of twenty-one to receive payouts as a result of playing machines;

(6) operate machines between the hours of two o'clock Sunday morning and six o'clock a.m. Monday morning;

(7) violate valid local zoning ordinances

(8) cash any business, personal, or employment checks of any individual or business;

(9) make loans to any individual or business;

(10) accept a credit card or debit card from a player for the exchange or purchase of game credits or for advancement of coins or currency;

(11) be located within five hundred feet, or within three hundred feet in a municipality, of any of these locations: a public or private elementary, middle, or secondary school; a public or private kindergarten or daycare; a public playground or park; a public vocational or trade school or

technical educational center; a public or private college or university; or house of worship; or a subdivision which has a covenant that prohibits the location of a commercial enterprise within the subdivision;

(12) knowingly allow playing of machines by a person in an intoxicated condition; or

(13) extend credit, in any manner, to a player. A machine operator or licensed establishment shall not allow an agent or any employee of the operator or establishment to provide a loan or extension of credit to a player.

(B) A machine owner or operator or any other person shall not at the location of the licensed establishment:

(1) engage in business as a Level I or Level II check cashing service, as defined in Section 34-41-10;

(2) engage in business as a deferred presentment service, as defined in Section 34-39-120;

(3) make restricted loans, as defined in Section 37-3-501(3);

(4) make supervised loans, as defined in Section 37-3-501(1); or

(5) make loans on the security of a motor vehicle certificate of title.

(C) The distances in this article shall be measured in a straight line, without regard to intervening structures or objects, from the nearest property line of the lot on which a building or structure is used as a licensed establishment to the nearest property line of the location in subsection (A)(11) of this section or Section 12-22-720(B).

(D) Except as otherwise provided herein, the provisions of this section apply to all applicants and licensees. However, the distance requirements set forth in this subsection (A) do not apply to:

(1) an establishment which operated or allowed the operation of machines for which licenses were issued before May 30, 1993; or

(2) an establishment which:

(a) operated or allowed the operation of machines for which licenses were issued on or after May 30, 1993 and which were in operation on the effective date of this chapter; and

(b) was in compliance with the distance requirements in effect prior to the enactment of this chapter.

(E) Each county or municipality, by ordinance, may determine the zoning of locations for the operation of machines. The zoning restrictions may not be less restrictive than this chapter.

Section 12-22-720. (A) An establishment license must not be issued until the department determines that the location is in compliance with Section 12-22-710.

(B)(1) The department shall not issue an establishment license to a new establishment that is closer than one hundred feet to an existing establishment even if the applicant has different principals than the existing licensed establishment(s) or where a licensure application for another establishment is pending.

(2) For purposes of this section:

(a) 'new establishment' means an establishment which did not have machines on May 31, 1999; and

(b) an 'existing establishment' means:

(i) an establishment which is licensed at the time of the application for a license for a new establishment; or

(ii) an establishment which had machines on May 31, 1999 and which is under the control of the same person who was licensed for the location under the provisions of Chapter 36, Title 12 on May 31, 1999.

(3) Notwithstanding the provisions of item (1) of this subsection, the department may issue an establishment license after notice and the procedures in this section if the department otherwise determines that the location is a proper one.

(C)(1) The person applying for the establishment license closer than permitted under subsection (B)(1) shall place a notice at least once a week for three consecutive weeks in a newspaper or newspapers most likely to provide notice to interested citizens of the county, city, or community in which the person seeks to locate the proposed establishment. The department shall determine which newspaper or newspapers meet the requirements of this section based on available circulation figures. If a newspaper

is published within the county and historically has been the newspaper where legal notices are published, the advertisements published in that newspaper meet the requirements of this section. Notice also must be given by displaying a sign for fifteen consecutive days at the site of the proposed establishment. The sign shall:

> (a) state that a license for the operation of machines is being sought and that the establishment will be able to issue cash payouts from these machines;
>
> (b) tell an interested person where and when to send a written protest of the application;
>
> (c) be in bold print; and
>
> (d) cover a space at least eleven inches wide and eight and one-half inches high.

(2) A person residing in the county in which an establishment license is requested to be granted pursuant to subsection (B)(3), or a person residing within five miles of the establishment for which an establishment license is requested pursuant to subsection (B)(3), may, before seven days after the last published notice, protest the issuance of the license if a written protest is filed with the department setting forth:

> (a) the name, address, and telephone number of the person filing the protest;
>
> (b) the name of the applicant for the establishment license and the address of the establishment sought to be licensed;
>
> (c) the specific reasons why

the application should be denied; and

(d) whether the protestant wishes to attend and offer testimony before a contested case hearing before the Administrative Law Judge Division.

(3) Upon receipt of a timely filed protest, seeking a contested hearing before the Administrative Law Judge Division, the department may not issue the establishment license but shall forward the file and its determination to the Administrative Law Judge Division.

(4) If the protestant expresses no desire to attend a contested hearing and offer testimony, the protest is considered invalid, and the department shall continue to process the application and make its determination of whether all other statutory requirements for the license are met.

(5) The department shall determine whether the location is a proper one. Any protestor or the applicant may appeal the department's determination.

Section 12-22-730. The department must issue regulations to strictly enforce the provisions of this chapter so as to prevent the licensure of an establishment or establishments that would allow machine operators to circumvent the prohibition against more than five machines being located on any premises. Nothing in this section, and the terms as they are defined in this chapter, shall be construed to be unenforceable because of the pendency of, or the failure to issue, any regulations by the department. This chapter must be liberally construed to supercede any regulation in existence after the effective date of this act that would impede the department in any way from strictly enforcing the provisions of this chapter regarding the prohibition against more than five machines being licensed

on the same premises.

Section 12-22-740. (A)(1) Except as provided in subsection (B), machines shall not be operated or continue to operate at any casino. For purposes of this chapter, the term 'casino' shall mean both of the following:

> (a) any two or more 'single places or premises', as that term was defined, applied, and interpreted in Regulation 117-190 on or before May 31, 1999, that are located within a single structure; and
>
> (b) beginning December 1, 1999, any two or more establishments located within one hundred feet of each other that have establishment licenses issued to the same person or a person who has the same principals.

(2) In determining whether an establishment violates this section, the department shall consider whether more than one licensed establishment operates within a single structure, unless the distance between the licensed establishments exceeds one hundred feet and the licensed establishments are not owned by the same person, do not have any of the same principals, and the owner of one is not a principal of another licensed establishment. Licenses denied under this section are subject to review under Section 12-60-1310.

(B)(1) A casino shall not operate or continue to operate except as provided in this subsection. No casino shall continue to operate as a casino unless on May 31, 1999:

> (a) machines were both licensed and in operation within each

'single place or premises' as that term was defined, applied, and interpreted in Regulation 117-190 on or before May 31, 1999; and

(b) each single place or premises within the casino met the qualifications of Regulation 117-190 and a certificate of occupancy, if otherwise required by law, has been issued for the structure within which two or more single places or premises are located.

(2) After December 1, 1999, each casino authorized to operate after May 31, 1999 shall be permitted to re-apply for and may be granted renewal of licenses that, notwithstanding any other provision of the law, must expire and may not be renewed after July 1, 2004. Pursuant to Sections 1, 9, and 11 of Article V, the General Assembly provides that the Magistrate, Circuit and Appellate Courts do not have jurisdiction to extend the termination date of July 1, 2004, and may not enjoin the enforcement of this subsection by the department or the division. Nothing in this subsection shall be construed to affect the jurisdiction of the state courts regarding other provisions of this chapter.

(3)(a) After July 1, 2004, casinos may continue to operate within a county if the county governing body, prior to July 1, 2004, adopts an ordinance authorizing the operation of casinos.

(b) An ordinance adopted pursuant to this item may not authorize the operation of a casino if the casino was not in operation on May 31, 1999.

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(E) The applicant shall submit proof with the application that he does not owe any federal or state delinquent taxes, penalties, or interest.

(F) As a condition of receiving a license under the provisions of this chapter, each licensee shall agree that the division, the department, and their agents and employees, shall have unrestricted access and the right to inspect any premises under the control of the licensee in which any activity relating to the provisions of this chapter is conducted.

(G) An application which contains material omissions or misrepresentations is cause for denial, suspension, or revocation of a license and disabling of all machines of that licensee.

(H) Failure to comply with a reasonable request of the department is grounds to deny or revoke a license.

Section 12-22-1120. Each applicant shall immediately make available for inspection, by any department or division employee, all records and the establishments where machines are placed or operated, or where machines, devices, or equipment are manufactured, sold, serviced, or distributed.

Section 12-22-1130. (A) The applicant shall file a duplicate application with the department. The department shall forward one of the applications to the division. The division shall return the background investigation to the department.

(B) Unless the time requirements for issuing a license are waived by the applicant, the department must make its decision on whether to issue a license to the applicant not later than sixty days after the completion of the

background investigation, including the fingerprint reviews, and the recommendation, if any, of the division, or not later than one hundred eighty days from the date a complete application is filed with the department, whichever occurs first. The department must inform each applicant of the department's decision.

(C) The department shall determine whether the applicant owes any delinquent state taxes, fines, penalties, or interest.

(D) The department may not issue any license until the background investigations are concluded. The department shall make affirmative determination that the applicant is qualified and the applicable license or associated fees have been paid before issuing any license.

(E) The department shall notify the applicant by mail if an application is incomplete. The notification must be sent to the address on the application. The notification must state the deficiencies in the application. If after the second notice of an incomplete application the applicant has not responded, the department shall consider the application withdrawn.

Section 12-22-1140. (A) The division shall conduct background investigations on those persons associated with the operation of machines as provided in this chapter. A background investigation is defined as a security, criminal, and credit investigation of a principal connected to that business. The division shall conduct the investigations and inspections it considers necessary to fulfill its responsibilities under this chapter.

(B) The division shall:

(1) promptly and in a reasonable

order, investigate all applications, enforce the provisions of this chapter, and provide to the department all information to allow the department to issue or denythe license;

(2) provide the department with all information necessary for all actions under this chapter and for all proceedings involving enforcement of the provisions of this chapter or any regulations;

(3) investigate violations under this chapter and any regulations;

(4) conduct continuing review of machine operations through on-site observation and other reasonable means, to assure compliance with this chapter;

(5) receive and take appropriate action on any referral from any law enforcement agency or the department relating to any evidence of a violation of this chapter and regulations;

(6) exchange fingerprint data with, and receive criminal history information from, the Federal Bureau of Investigation or other law enforcement agencies; and

(7) have the authority to request and receive information, materials, and any other data from any person.

(C)(1) A person applying for a license or required under this article to undergo a criminal history background check shall undergo a state fingerprint review to be conducted by the division to determine any state criminal history and a fingerprint review to be conducted by the Federal Bureau of Investigation to determine any other criminal history. The fingerprint reviews required by this subsection may be required upon subsequent applications.

(2) When the applicant has principals it must disclose any information required by the department to obtain fingerprints and criminal background checks for the principals so that an applicant may not circumvent the purpose of this section.

(3) Each applicant with submission of an application shall submit a valid fingerprint card for every principal of the business seeking to be licensed.

(4) At the time of filing the application, the applicant must include certified checks for the fees imposed by the State Law Enforcement Division and the Federal Bureau of Investigation, respectively, for the purpose of conducting fingerprint reviews required by item (1) of this subsection.

(D) In connection with the responsibilities under this chapter, the division or the department and their employees and agents may:

(1) inspect and examine all establishments where machines are operated;

(2) inspect and examine where machines or equipment are manufactured, sold, distributed, or serviced;

(3) inspect all equipment and supplies in, about, upon, or around the establishment;

(4) seize and remove from such establishments and impound any machines, equipment, or supplies for the purposes of examination and inspection;

(5) inspect, examine, and audit all records pertaining to an applicant's operation; and

(6) seize, impound or assume

physical control of any book, record, ledger, machine, and boxes and their contents.

(E) The division may obtain warrants for the inspection and seizure of any property possessed, controlled, or otherwise held by any applicant or principal.

(F) The division may inspect any applicant or licensee for compliance with the provisions of this chapter and regulations and to investigate any violations.

Section 12-22-1150. (A) Investigations must be conducted on manufacturers, distributors, establishment owners, machine owners, machine operators, and their principals.

(B) As a condition of receiving a license under the provisions of this chapter, each applicant and principal shall agree that the division and the department have unrestricted access and the right to inspect any premises under the control of the applicant or principal in which occurs any activity related to the provisions of this chapter.

(C) Each applicant and principal, by signature of his application, grants the division the authority to access state, national, and international information for validation of information contained on the application. Any information found at the state, national, or international level which would prevent the applicant from obtaining any license required under this chapter must be used to do so.

(D) Each applicant and principal shall cooperate with the division and the department in the performance of their duties.

Section 12-22-1160. (A) The department shall deny a license if a background investigation of any applicant or

principal of an applicant reveals any of the following:

(1) a conviction within fifteen years before the date of the application in any jurisdiction for any of the following offenses:

(a) any offense punishable by imprisonment for two or more years;

(b) any gambling offense;

(c) theft or any crime involving false statements or declarations;

(d) a criminal offense involving fraudulent activity or defined as a fraud;

(2) a determination of liability for, or an agreement that he was liable for, a civil judgment based in whole or in part upon conduct described in item (1) of this subsection;

(3) omission of any material facts to the division or the department during initial or subsequent background investigations or a misstatement, or untrue statements, of material facts with respect to such investigation;

(4) association with persons or businesses of known criminal background, or persons of disreputable character, that may adversely affect the general credibility, security, integrity, honesty, fairness, or reputation of the State or to the effective regulation of video poker;

(5) failure to cooperate with any legislative investigative committees or other officially constituted body acting on behalf of

the United States or any state, county, or municipality which seeks to investigate crimes related to gambling, corruption of public officials, or any organized criminal activities;

(6) that the applicant owes any federal, state, or local delinquent taxes, penalties, or interest; or

(7) except for a manufacturer, the applicant has not been a resident of the State for two years.

(B) The applicant for a license required by this chapter, and all principals of the applicant, must file with the application a sworn statement, under penalties of perjury, affirming that:

(1) the person is not attempting to obtain a license on behalf of any undisclosed person or entity;

(2) the person is of good character, honesty, and integrity;

(3) the person's prior activities, criminal record, if any, reputation, habits, and associations do not pose a threat to the public interest of this State or to the effective regulation and control of video gaming; and

(4) all information provided in the application is true.

Section 12-22-1170. Distributors, principals, machine owners, and machine operators, and any other persons the division or the department considers necessary have an affirmative duty to maintain on file with the department and the division current and correct disclosure of all principals and all material facts required for licensure.

Section 12-22-1180. Each applicant shall bear all risks of unintentional adverse public notice, embarrassment, criticism, damages, or financial loss which may result from any disclosure or publication of any material or information obtained by the department or division pursuant to action on an application.

Article 13

Penalties

Section 12-22-1310. (A) A person who fails, neglects, or refuses to comply with the terms and provisions of this chapter or who fails to attach the required license to any machine or device, is subject to a penalty of two thousand five hundred dollars for each failure, and the penalty must be assessed and collected by the department. This penalty must be deposited in the same manner as other monies collected pursuant to this chapter.

(B) Except as provided in Section 12-22-1320, with respect to any failure to comply with any provisions of this chapter occurring at a licensed establishment, the machine operator and the machine owner are both liable for any penalty and are both subject to revocation and suspensions as provided in this chapter.

Section 12-22-1320. (A)(1) Except as provided in item (2) of this subsection, the department may revoke the licenses of establishments, machine owners, machine operators, and machines used in the establishment and impose a monetary penalty of not less than one thousand dollars and not more than ten thousand dollars on each of the owners of such licenses for each failure to comply with a provision of Section 12-22-710, or any provision of a regulation pertaining to Section 12-22-710.

(2) With respect to violations of Section 12-22-710(A)(4), the department may revoke the license of the establishment where the violation occurred.

(B) Any establishment violating a provision of Section 12-22-710 or any provision of a regulation pertaining to Section 12-22-710 may have its privilege for operating or allowing the operation of video game machines suspended as follows:

(1) upon the first violation, the privilege for operating or allowing the operation of machines is suspended for a period of up to six months;

(2) upon the second violation, the privilege for operating or allowing the operation of machines is suspended for a period of up to one year;

(3) upon the third or subsequent violation, the privilege for operating or allowing the operation of machines is suspended for a period of up to eighteen months.

(C)(1) The department, upon a determination that the violation is willful, may refer the violation to the Attorney General or to the appropriate circuit solicitor for criminal prosecution, and, upon conviction of a willful violation, the person must be fined not more than ten thousand dollars or imprisoned not more than two years, or both.

(2) Beginning on July 1, 2004, this subsection shall not apply to violations of Section 12-22-710(A)(1).

Section 12-22-1330. A person is guilty of a felony and, upon conviction, the person must be fined not more than

twenty-five thousand dollars or imprisoned not more than five years, or both, if the person willfully:

(1) tampers with a machine, location controller, or associated equipment with intent to interfere with its proper operation or the proper operation of the central computer monitoring system;

(2) manipulates the outcome, payoff, or operation of a machine;

(3) launders or knowingly allows another to launder money through one or more machines;

Section 12-22-1340. The following activities are additional civil violations of this chapter subject to the penalties in Section 12-22-1310:

(1) tampering with a machine, location controller, or any other part, device, or system to interfere with its proper operation or the proper operation of the central computer monitoring system;

(2) operating, or allowing the operation of, machines that are not connected to the central computer monitoring system in accordance with this chapter;

(3) refusing or otherwise preventing the inspection or examination by the department, the division, or any law enforcement officer, of any establishment, and any premises used for the manufacture, distribution, or storage of machines within this State; and

(4) refusing or otherwise preventing the examination by the department or division of revenue, payouts, or net

machine income, records or equipment of any licensed or unlicensed machine owner, machine operator, manufacturer, distributor, or establishment.

Section 12-22-1350. (A) A person in possession of, or operating, or allowing the operation of a contraband machine or contraband device at any place within this State is subject to a civil penalty of not more than ten thousand dollars per machine or piece of associated equipment.

(B) When the department or division deems it necessary in connection with subsection (A), it may require the owner of a machine, device, or associate equipment to obtain a certification from an approved testing laboratory that the machine or a game or associate equipment meets the standards and requirements of this chapter. The cost of this certification is the responsibility of the owner of the machine, device, or associated equipment.

(C) Contraband machines, contraband devices, or contraband associate equipment may be seized by any law enforcement officer of the State or any of its political subdivisions who shall appear before any magistrate of the county in which the machine, device, or associated equipment was seized. If the magistrate is satisfied that the item is contraband, the magistrate shall direct that it be destroyed. The magistrate, at his discretion, may order an examination of the item, in person before the magistrate or by an approved testing laboratory, to assist in the determination as to whether the item is contraband.

Section 12-22-1360. Skimming of machine proceeds is the intentional excluding or the taking of any action in an attempt to exclude anything or its value from the deposit, counting, collection, or computation of revenues from machines. Whoever commits skimming of machine proceeds

is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years, and must be fined not more than twenty-five thousand dollars, or both.

Section 12-22-1370. No machine owner, manufacturer, distributor, machine operator, or any principal may have any financial interest whatsoever or any loans or business relationship with a testing laboratory or any contractual relationship with a testing laboratory except for a contract for the providing of testing services. Any person who violates the provisions of this section is guilty of a felony and upon conviction must be imprisoned for not more than ten years, and in addition may be fined not more than twenty-five thousand dollars.

Section 12-22-1380. (A) In addition to any other penalties, any machine or device not having attached thereto the required license, or which is improperly licensed, must be seized and confiscated by the department, its agents or employees, and sold at public auction after thirty days' advertisement. Upon payment of the license required, the department may, within its discretion, return any property so seized and confiscated and compromise any penalty assessed.

(B) The owner or person from whom the property is seized may at any time within five days after the seizure repossess the property by filing with the department a bond in cash or a bond executed by a surety company authorized to do business in this State in double the amount of the tax and penalties due. Within ten days thereafter the person must bring action in a court of competent jurisdictionto have the seizure set aside; otherwise, the bond so filed must be declared forfeited by the department.

Section 12-22-1390. (A) When the department or the division is notified in writing that an establishment, owner or

distributor is or has been in violation of this chapter and that one or more persons have notice or knowledge of a violation, the department or division shall have thirty days from the date of the receipt of the notice to initiate and enforcement action consistent with this chapter.

(B) If the department or division affirmatively declines to act or fails to initiate an enforcement action for the alleged violation within thirty days, the person or persons who have knowledge of the alleged violation may serve written notice upon the department of their intention to file a request for a proceeding to enforce the provisions of this chapter in the name of the department or division.

(C) Within thirty days of the receipt of the notice from the person or persons with knowledge of the alleged violation, the department or division shall forward the notice of intent to file a request for a proceeding to the Office of the Attorney General who shall determine:

(1) if the person or persons with knowledge of the violation has sufficient knowledge, expertise and experience to adequately represent the interests of the State, the department and the division in the action;

(2) if the person or persons with knowledge of the violation are willing to advance all costs and expenses to be incurred in the proceeding; and

(3) that the Office of the Attorney General will not pursue the enforcement of the alleged violation.

Upon written certification of Office of Attorney General that these conditions have been met, the person or persons with knowledge of the alleged violation may proceed to commence a civil action for any

violation of any of the provisions of this chapter.

(D) If the Office of the Attorney General denies certification and fails to pursue enforcement within sixty days of notice or fails to act on a person's notice within thirty days of receipt, the person or persons with knowledge of a violation of this chapter may move to commence a civil action as provided herein.

(E) The civil action must be brought in the name of the State, and may be filed in any state court of competent jurisdiction. The person bringing the civil action may seek any fine or penalty that the State may seek.

(F) A copy of the complaint must be served on the Attorney General if he is not bringing the action, and the director, by the person bringing the action, either of whom may elect to join any action brought by the person.

(G) If the State, as determined by the Attorney General and the Governor acting together, joins with an action brought by a person under this section, the State, in addition to other fines or penalties, may request the suspension or revocation of licenses. The person shall receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to litigating the action. The person also shall receive an additional amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable hourly attorney's fees and costs, to be paid by the defendant.

(H) If the State, as determined by the Attorney General and the Governor acting together, does not join with the action under this section, the person bringing the action

or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and revocation. The amount must not be less than twenty-five percent and must not be more than forty percent of the proceeds of the action or settlement, and must be paid out of the proceeds. The person also shall receive an additional amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable hourly attorney's fees and costs, to be paid by the defendant.

(I) The State is not liable for expenses which a person incurs in bringing an action under this section.

(J) No settlement may be entered without approval by the department.

(K) Any determination in an action under this section that a licensee has violated a provision of this chapter is grounds for revocation of those licenses and the department may bring a subsequent action for suspension or revocation.

Section 12-22-1400. Conspiring to subvert the provisions of this chapter is a conspiracy as defined and punished in Section 16-17-410.

Section 12-22-1410. Each violation or each day in violation of a provision of this chapter or any provision of a regulation pertaining to this chapter constitutes a separate offense.

Section 12-22-1420. The penalties authorized by this chapter are effective immediately upon imposition and may not be stayed by any administrative or judicial action.

Section 12-22-1430. In any action under this chapter, no person may raise as a defense that he acted on the advice

of his certified public accountant, unless he proves that he supplied that accountant with a copy of this chapter and all relevant regulations.

Article 15

Arcade Game Machines and Other Devices

Section 12-22-1510. Cash payouts are not permitted with respect to the games played on machines and other devices licensed under this article. The provisions of the other articles do not apply to the machines and devices licensed under this article.

Section 12-22-1520. Every person required to obtain a license for any machine or device described in Section 12-22-1530 shall maintain records showing the manufacturer's serial number, model or type of machine, and the location of the machine. The taxpayer shall maintain information relating to the payment of any monies or compensation made to any persons as part of a lease or contractual agreement to operate the machine on the premises of the person. Information required by this section must be available on demand for inspection by a representative of the department.

Section 12-22-1530. (A) Every person who owns and operates, or places for use in another person's place or premises for a share of any revenue, one or more of the following machines or devices shall apply for and procure from the department a license effective for two years for the privilege of making use of the machine or device in this State. The person shall pay for the license a nonrefundable fee of fifty dollars for each machine or device in items (1) and (4), two hundred dollars for each machine or device in item (2), and two thousand dollars for each machine or device in item (3):

(1) a machine for the playing of music or kiddy rides operated by a slot or mechanical amusement devices and juke boxes in which is deposited a coin or thing of value. A machine on which an admissions tax is imposed is exempt from the license provisions of this section;

(2) a machine for the playing of amusements or video games, without free play feature, or machines of the crane type operated by a slot in which is deposited a coin or thing of value and a machine for the playing of games or amusements, which has a free play feature, operated by a slot in which is deposited a coin or thing of value, and the machine is of the nonpayout pin table type with levers or 'flippers' operated by the player by which the course of the balls may be altered or changed. A machine on which an admissions tax is imposed is exempt from the license provisions of this section;

(3) a machine of the nonpayout type, in-line pin game operated by a slot in which is deposited a coin or thing of value except machines of the nonpayout pin table type with levers or 'flippers' operated by the player by which the course of the balls may be altered or changed;

(4) billiard or pocket billiard table, foosball table, bowling lane table, or skeeball table operated for profit.

(B) The license must be purchased in advance on or before the first day of June every two years or before making a machine available for play. All licenses expire May thirty-first the second year of which the license is valid following the date of issue.

(C) Machines which have multiplayer stations must have a separate license for each such station.

(D) As an alternative to the license required in subsection (A), a person may be granted a nonrefundable seasonal license beginning April first and expiring September thirtieth, following the date of issue, which must not be prorated. The fee for this six-month license is one-fourth the biennial license fee.

(E) If the license required in subsection (A) is purchased after June thirtieth, the license fee must be prorated on a twenty-four month basis with each month representing one twenty-fourth of the license fee imposed under subsection (A).

(F) Upon application being made for a license to operate any machine, the department may presume that the operation of the machine is lawful, but the issuance by the department of a license does not make lawful the operation of any machine which is unlawful under the laws of this State. When a license has been issued, the sum paid for the license must not be refunded notwithstanding that the operation of the machine or apparatus is prohibited.

(G) Failure to obtain a license as required by this article makes the person liable for the penalties imposed in this article.

(H) Every person who maintains for use, or permits the use, on any place or premises occupied by him, any devices subject to the license imposed by subsection (A) of this section must attach the proper state license to a permanent, nontransferable part of the machine before its operation is commenced.

Section 12-22-1540. (A) In addition to all other licenses required by this article, a person required to obtain a license for any machine or device described in Section 12-22-1530 shall obtain an owner's license biennially as follows:

(1) fifty dollars for devices in Section 12-22-1530(A)(1) and (A)(4);

(2) two hundred dollars for devices in Sections 12-22-1530(A)(2) and 12-22-1530(A)(3).

(B) Only one license is required regardless of the number or type of devices owned or operated, and the cost of that license is the highest fee enumerated in this section for a device owned or operated.

(C) The license may be purchased in advance on or before the first day of June every two years or before making a machine or device available for play. All licenses expire May thirty-first the second year of which the license is valid following the date of issue.

(D) Failure to pay taxes to the State is grounds for the cancellation of the license provided in this section.

(E) The provisions of this section do not apply to any person with a current and valid machine owner's license issued under Article 3 of this chapter.

Section 12-22-1550. In lieu of the licenses required under Sections 12-22-1530 and 12-22-1540, the department may issue a temporary license to persons making application to operate machines or devices required to be licensed under this article at a recognized county or state fair. The temporary license fee is the total amount of license fees required on all machines or devices for which application is

made, based upon one-twenty-fourth of the biennial license required under Sections 12-22-1530 and 12-22-1540. The license is valid for the specific location designated on the license and the number of machines for which application was made and expires when the designated fair officially ends.

Section 12-22-1560. Machines or devices licensed pursuant to Section 12-22-1530(A)(1), (A)(2), and (A)(4) are not subject to confiscation for a violation of Section 16-19-30, 16-19-40, 16-19-50, or 16-19-130.

Section 12-22-1570. A person who fails, neglects, or refuses to comply with the provisions of this article, or who fails to attach the required license to any machine or device as required under this article, is subject to a penalty of five hundred dollars for each failure, and the penalty may be assessed and collected by the department. This penalty may be deposited to the credit of the general fund of the State.

Section 12-22-1580. In addition to the penalties above provided, any machine, apparatus, billiard, or pocket billiard table not having attached thereto the required license, or which is improperly licensed, must be seized and confiscated by the department, its agents or employees, and sold at public auction after thirty days' advertisement. Upon payment of the license required, the department may, within its discretion, return any property so seized and confiscated and compromise any penalty assessed.

Section 12-22-1590. Municipalities and counties may levy a license tax on the business tax taxed under this article but in no case may the tax exceed twenty-five dollars.

Section 12-22-1600. Any person who owns or operates machines or devices described in Section 12-22-1530 must have attached to the machine or device

information identifying the owner of the machine or device. The identification must be placed on an area of the machine or device which is visible for inspection purposes. This identification is a condition precedent must be attached before the machines or devices may be operated on location or in an establishment. Intentional or willful failure to comply with this requirement subjects the violator to the penalty and enforcement provisions of this chapter.

Section 12-22-1610. If an unlicensed machine is seized by law enforcement as a prohibited machine under the laws of this State, the department shall assess a penalty equal to the amount of the license fee.

Article 17

Transitional Provisions

Section 12-22-1700. In accordance with this chapter, the department may set the standards for video game machines, modems, location controllers, software, hardware, the central computer monitoring system, and associated equipment. Failure to comply with these standards subjects the violator to the civil and criminal penalties, including fines, suspensions, and revocations established in this chapter including the provisions relating to the time such penalties apply without regard to stays. Until the department adopts such standards, the standards provided in Parts A through D of this section must apply and must be met before issuance of a license. The definitions provided in Section 12-22-10 apply for purposes of this section.

Part A

Technical standards for Machines and Location Controllers

(A) Each machine must be able to connect to a monitoring system via a serial communications port to a location controller meeting the requirements set forth by the department and using a communications protocol provided by the department or its designated agent.

(B) Each machine must be capable of monitoring and storing the following items:

(1) The cumulative total of the following for each twenty-four hour period, from 12:00 a.m. to 12:00 a.m., which may be recorded as a "snapshot" of the specified counters at the beginning and ending of each twenty-four hour period:

(a) cash in, defined as money in dollars and cents;
(b) credits purchased;
(c) credits earned or won;
(d) credits played;
(e) credits paid;
(f) cash paid.

(2) The following security events and the time and date of such events:

(a) game door open;
(b) coin-bill/drop door open;
(c) power off/on;
(d) off line/on line to the location controller;
(e) game control board access (logic area).

(C) Each machine must contain Erasable Programmable Read Only Memory (EPROM) containing all

game logic, and contain RAM (Random Access Memory) containing all counters and meters in electronic format, or such other technology as may later be designated by the department.

(D) Each machine is not allowed to operate if it is not connected in on-line mode to a location controller meeting the requirements set forth by the department.

(E) A machine must collect the data required in this chapter and communicate this information to a location controller for storage until requested by the central computer monitoring system. Each security event listed in this chapter may reflect a time and date stamp and the VGMID of the machine.

(F) A machine automatically must disable itself if communication is lost from the location controller. A machine must store this event. A machine must report a disabling event to the location controller when communication is restored.

(G) A machine must be capable of being disabled by the central computer monitoring system or the location controller.

(H) A machine must be capable of being enabled by the central computer monitoring system or by location controller once it has been enabled by the central computer monitoring system.

(I) A machine must be protected from unauthorized interference or tampering by any person or external device so as to not corrupt or suspend the communication signals or transmitted data required for the proper functioning of the machine and the associated location controller.

(J) Each machine must have a surge protector installed on the line that feeds power to the machine and must meet the requirements of the department.

Part B

Hardware Specifications

(A) A machine must have electrical and mechanical parts and design principles that do not subject a player to physical hazards.

(B) A machine must have a battery backup or an equivalent for the electronic meters and be capable of maintaining accurate information required by law and regulation for one hundred eighty days after power is discontinued from the machine. The backup device must be kept within the locked logic board compartment of the machine.

(C) A machine must have an on/off switch that controls the electrical current used in the operation of the machine and must be in an accessible place within the interior of the machine.

(D) The operation of each machine must not be adversely affected by static discharge or other electromagnetic interference.

(E) Each machine must have one coin acceptor, either electronic or mechanical, one bill acceptor, either electronic or mechanical, or one of each. Approval letters and test reports of the coin and bill acceptors from other state or federal jurisdictions must be submitted to the department. All coin and bill acceptors are subject to approval by the department.

(F) The internal space of a machine must not be readily accessible when the front door is closed or sealed.

(G) Logic boards and software EPROMs and RAM must be in a separate, locked and sealed area within the machine and must only be accessible only in accordance with guidelines established by the department. The area must be sealed by, and accessible to, the division.

(H) The cash and coin compartment must be contained in a locked area within or attached to the machine. This compartment must be accessible by the machine owner or machine operator.

(I) No switches of any kind, to include but not limited to hardware and software switches, must be installed that alter the pay tables or payout percentages in the operation of a game below the minimum payback of ninety percent, within standard rounding, in which the theoretical payout percentage is determined using standard methods of probability theory. Switches or other devices may be installed to control graphic routines, speed of play, and sound.

(J) A single printing mechanism must be capable of printing an original ticket and retaining an exact, legible copy within the machine. The ticket must record the number of credits, the value of the credit, and a validation number, when credits accrued are printed on a ticket for validation.

(K) The printed ticket is the only allowable method for issuing payouts. Hoppers are prohibited.

(L) A clearly visible identification plate must appear on the front exterior of the machine that contains the manufacturer, the manufacturer's serial number, the model number, the VGMID, and the name of the machine owner.

This plate must not be removed. This identification is a condition precedent before the machines may be operated on location. Failure to comply with this requirement subjects the violator to the penalty and enforcement provisions of Chapter 22 of Title 12 of the 1976 Code including the provision of Section 12-22-1380 relating to the time such penalties apply without regard to stays.

(M) Equipment must be installed in a manner that enables a machine to communicate with the department's central computer monitoring system via the location controller using a communications protocol provided to each manufacturer of machines and location controllers provided by the department or its designated agent.

Part C

Software Requirements

(A) Each machine must maintain electronic accounting meters at all times, regardless of whether the machine is being supplied with power. Each meter must be capable of maintaining totals no less than eight digits in length for the information required by the law and by regulation of the department.

(B) Electronic meters must record the cumulative total of cash in, credits purchased, credits paid, credits earned/won, cash paid, and credits played, per each twenty-four hour period, from 12:00 a.m. to 12:00 a.m. This information may be recorded as a snapshot of the specified counters at the beginning and ending of each twenty-four hour period.

(C) Electronic meters also must record security events, with the time and dates, to include game door open, coin-bill/drop door open, power off/on, off line/on line to the

location controller, and game control board access.

(D) No machine may have a mechanism that an error will cause the electronic accounting meters to automatically clear. Clearing of the electronic accounting meters may be completed only after notification and approval by the department and supervised by the division.

(E) Each machine must have a random number generator that determines the occurrence of a specific card or a specific number to be displayed on the video screen. A selection process is considered random if it meets all the following requirements:

(1) each card position or each number position satisfies the ninety-nine percent confidence limit using the standard chi-squared analysis;

(2) each card or number position does not produce a significant statistic with regard to producing patterns of occurrences. Each card or number position is considered random if it meets the ninety-nine percent confidence level with regard to the runs test or any similar pattern testing statistic;

(3) each card or number position is independently chosen without regard to any other card or number drawn within that game play. This test is the "correlation test". Each pair of card or number positions is considered random if they meet the ninety-nine percent confidence level using standard correlation analysis; and

(4) each card or number position meets the serial correlation test, meaning that it is independently chosen without reference to the same card or number position in the

previous game. Each card or number position is considered random if it meets the ninety-nine percent confidence level using standard serial correlation analysis.

(F) All costs associated with the machines, to include upgrades or retrofits, in order for such machines to meet the requirements of the laws and regulations of this State are the responsibility of the machine owner.

Part D

Multiplayer Unit Requirements

(A) For purposes of this part, multiplayer units are divided into two general groups:

(1) units that share some common components (Group I); and

(2) units that share most components (Group II).

(B) Group I and Group II units are based on the common principal that they both try to accurately mimic live table play. Both groups may consist of a number of player stations, generally either three or five player units per machine, and some type of dealer display. Both groups of games allow the players to wager on the next hand to be played and the object of the game, and the payout table is based on the player beating the dealer's hand. The player stations and dealer draw from a common deck of cards. Neither of these groups contains any program routines that allow the player or device to gain an unfair advantage or to cheat the device or player.

(C) Group I and Group II units share common elements. The following define the difference in the two

groups of multiplayer units:

(1) Group I Units: Group I units have individual logic boards containing player station EPROMs and RAM containing all meter and event information for the individual station, as well as master logic boards in the dealer station containing master meters and the random number generation software used commonly by all of the player stations.

(2) Group II Units: Group II units often do not have any game or logic boards in the individual player stations. The program and game memory are stored in the dealer's station. The player's stations are generally "Dumb Terminals" containing player input buttons and coin or bill acceptors. This group of terminals sends and receives all information directly from the dealer's station. Generally, these stations do not have separate power switches. All electrical leads are fed from the dealer's station to the individual player's station and all game display information is shown on the common video display. The dealer's station controls the operation of the game including the random number generator, all meter information, all display functions, all communications with the central system, all event detection and storage logic, and all processor units and EPROMs used for the game. Individual terminals are not in "direct" communication with the central system, but rather use the dealer's station as a "head of string" device for each of the individual stations. The dealer's station contains all individual station meters as well as master meters for the entire group.

(D) A multiplayer unit must be handled in one of two ways, depending on whether it is a Group I machine or a Group II machine. Implementation of either method does not require modifications of the communications protocol or operational changes for either the department or the individual locations. Both methods may be handled entirely in the program code of the individual machines.

(1) Group I unit stations as described above must be wired as if they are separate machines. Each player station must have an optical connection and each station is responsible for its own communications. All meter and event data must be stored on the individual stations and be transmitted to the system on demand. EPROM signature calculations must include the dealer's station code, but each station must perform individual calculations and transmit the results independently of each other. All security, accounting, cash ticket, and event reporting functions must be supported in full.

(2) Group II games must be set up with a dedicated phone line and location controller in the same manner as every other licensed establishment in the State. The fiber optics must leave the location controller and go directly to the dealer's station and then back to the location controller. All communications must be sent from the central system and the site controller exactly as detailed in the communications protocol. The dealer's station is responsible for handling all of the communications for the player stations. If the system asked for meters for station number one, the dealer's station is responsible for collecting and sending that data to the

central system. The central system must behave exactly as if there are five separate machines. EPROM signature calculations must be performed over the dealer's station program code and transmitted back five times just as if there are five machines all running the same game code. All security, accounting, cash ticket, and event reporting functions must be supported in full.

(E) The department may handle on an individual basis, any type of multiplayer units that does not fit in either category Group I or Group II. Other multiplayer units are required to meet all applicable programming, communications, and security rules and regulations."

Penalties revised

SECTION 11. Section 12-54-40(H) of the 1976 Code is amended to read:

"(H) A person who:

(1) must obtain a license or purchase stamps for identification purposes and fails to obtain or display the license properly, or fails to affix the stamps properly; or

(2) must comply with statutory provisions and fails to do so, is subject to a penalty of not less than fifty dollars nor more than five hundred dollars for each failure. For failure to obtain or display a license as prescribed in Section 12-22-320, the penalty is two hundred dollars for each failure to comply."

Machine prohibition and penalties revised

SECTION 12. Section 12-54-40(M) of the 1976 Code is amended to read:

"(M) A machine owner or distributor, as defined in Chapter 22 of this title, who willfully places a machine on location, or who willfully allows or causes a machine to be operated, that does not accurately record the information required under Chapter 22 of this title is guilty of a felony and, upon conviction, must be imprisoned for not less than one year nor more than ten years, without benefit of probation, parole, or suspension of sentence, and in addition may be fined not more than twenty-five thousand dollars."

Video game machine references deleted

SECTION 13. Section 16-19-60 of the 1976 Code is amended to read:

"Section 16-19-60. Nothing in Section 16-19-40 or 16-19-50 shall extend to coin-operated nonpayout machines with a free play feature; provided, that nothing herein shall authorize the licensing, possession, or operation of any machine which disburses money to the player."

Slot and other machines prohibited; penalties; other sanctions

SECTION 14. Chapter 19, Title 16 of the 1976 Code is amended by adding:

"Section 16-19-65. (A) It is unlawful for any person

to keep or operate on his premises or permit to be kept or operated on his premises within this State any vending or slot machine, punch board, pull board, or other device pertaining to games or chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, and video games with free play feature which meet the technical requirements provided for in Article 9, Chapter 22 of Title 12, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

(B) Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

(C) Any vending or slot machine, punch board, or other device pertaining to games of chance prohibited by this section must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of this section or any other law of this State, shall direct that it be immediately destroyed.

Section 16-19-66. (A) It is unlawful for a person to operate, cause to operate, or attempt to operate an automatic vending machine, slot machine, coin-box telephone, or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use, or

enjoyment of property or service by means of a slug or any false, counterfeited, mutilated, sweated, or foreign coin, or by any means not lawfully authorized by the owner, lessee, or licensee of the receptacle.

(B) It is unlawful for a person to take, obtain, or receive from or in connection with any receptacle designed to receive lawful coin of the United States of America in connection with the sale, use, or enjoyment of property or service any goods, wares, merchandise, gas, electric current, or other article of value or the use or enjoyment of any telephone or telegraph facilities, or service, or of any musical instrument, phonograph, or other property, without depositing in and surrendering to the receptacle lawful coin of the United States of America in the amount required by the owner, lessee, or licensee of the receptacle.

(C) A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined in the discretion of the court or imprisoned not more than two years.

Section 16-19-67. A person who, with intent to cheat or defraud the owner, lessee, licensee, or other person entitled to the content of an automatic vending machine, slot machine, coin-box telephone, or other receptacle, depository, or contrivance designed to receive lawful coin or currency of the United States of America in connection with the sale, use, or enjoyment of property or service or who, knowing that the same is intended for unlawful use, manufactures for sale, or sells or gives away any slug, device, or substance intended or calculated to be placed or deposited in the automatic vending machine, slot machine, coin-box telephone, or other receptacle, depository, or contrivance is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years."

Prohibited acts revised

SECTION 15. Subitem (3) of Section 61-4-580 of the 1976 Code, as last amended by an act of 1999, bearing ratification number 97, is further amended to read:

"(3) permit gambling which is not authorized by Chapter 22 of Title 12 except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation."

License periods and fees

SECTION 16. (A) The provisions of Chapter 22, Title 12 as added by this act apply to any and all licenses to be issued on or after December 1, 1999.

(B)(1) By January 31, 2000, a person who is licensed

pursuant to Section 12-21-2728(A)(3) on November 30, 1999, for a license period which expires on May 31, 2000, shall apply for a new license to be issued in accordance with Chapter 22, Title 12. The person may continue to do business under the license issued under Section 12-21-2728(A)(3) until the Department of Revenue makes a determination regarding whether the person should be licensed under the provisions of Chapter 22, Title 12.

(2)(a) Upon a favorable licensing determination, the department shall issue a new license with an expiration date in the year 2002 established in accordance with the provisions of Section 12-22-320(D).

(b) The license fees shall be prorated based upon the expiration date for the new license and any unused portion of the license fee for the license which expires on May 31, 2000 shall be applied towards payment of the fee for the new license.

(C)(1) By July 31, 2000, a person who is licensed pursuant to Section 12-21-2728(A)(3) on November 30, 1999, for a license period which expires on May 31, 2001, shall apply for a new license to be issued in accordance with Chapter 22, Title 12. The person may continue to do business under the license issued under Section 12-21-2728(A)(3) until the Department of Revenue makes a determination regarding whether the person should be licensed under the provisions of Chapter 22, Title 12.

(2)(a) Upon a favorable licensing determination, the department shall issue a new license with an expiration date in the year 2003 established in accordance with the provisions of Section 12-22-320(D).

(b) The license fees shall be prorated based upon the expiration date for the new license

and any unused portion of the license fee for the license which expires on May 31, 2001 shall be applied towards payment of the fee for the new license.

(3) Upon an unfavorable licensing determination, the department shall revoke the license issued pursuant to Section 12-21-2728(A)(3) and shall issue a prorated refund to the person for the remainder of the license period.

(D) By December 31, 1999, a person who is required to be licensed as a machine operator and who is engaged in business at a location that is licensed pursuant to Chapter 36, Title 12 on November 30, 1999, shall apply for a machine operator's license issued pursuant to the provisions of Chapter 22, Title 12.

(E) By December 31, 1999, a person who is required to be licensed as a machine operator shall apply for an establishment license issued pursuant to the provisions of Chapter 22, Title 12 for a location that is licensed pursuant to Chapter 36, Title 12 on November 30, 1999.

(F) A machine license issued pursuant to Section 12-22-21-2720(A)(3) shall continue in effect until the expiration of the original license period provided a machine must meet all requirements imposed by Chapter 22 of Title 12 when these requirements take effect.

(G) The department, at its discretion and for the efficient administration of the law, may prorate licenses in any manner to implement or change the expiration date established in this section and to stagger the issuances of the licenses by county or by any other method considered appropriate by the department.

Applicability and repeal

SECTION 17.

A. The application of Articles 19 and 20, Chapter 21, Title 12 is suspended prospectively, except as provided in Section 16. To the extent that regulations promulgated pursuant to the authority of Articles 19 and 20, Chapter 21, Title 12 are not inconsistent with Section 10, those regulations remain in effect until and unless otherwise modified or repealed pursuant to the Administrative Procedures Act.

B. Articles 19 and 20, Chapter 21, Title 12 are repealed effective December 31, 2000.

PART IV

Gambling Losses and Civil Actions

When suits for gambling losses permitted

SECTION 18. Article 1, Chapter 1, Title 32 of the 1976 Code is amended by adding:

"Section 32-1-60. Beginning on the effective date of this section, the provisions of Sections 32-1-10, 32-1-20, and 32-1-30 apply only to those gambling activities not authorized by law."

Enforcement actions

SECTION 19. Article 20, Chapter 21, Title 12 of the 1976 Code is amended by adding:

"Section 12-21-2805. (A) When the department or the division is notified in

writing that an establishment, owner or distributor is or has been in violation of this article or Article 19 of this chapter and that one or more persons have notice or knowledge of a violation, the department or division shall have thirty days from the date of the receipt of the notice to initiate and enforcement action consistent with this chapter.

(B) If the department or division affirmatively declines to act or fails to initiate an enforcement action for the alleged violation within thirty days, the person or persons who have knowledge of the alleged violation may serve written notice upon the department of their intention to file a request for a proceeding to enforce the provisions of this chapter in the name of the department or division.

(C) Within thirty days of the receipt of the notice from the person or persons with knowledge of the alleged violation, the department or division shall forward the notice of intent to file a request for a proceeding to the Office of the Attorney General who shall determine:

(1) if the person or persons with knowledge of the violation has sufficient knowledge, expertise and experience to adequately represent the interests of the State, the department and the division in the action;

(2) if the person or persons with knowledge of the violation are willing to advance all costs and expenses to be incurred in the

proceeding; and

(3) that the Office of the Attorney General will not pursue the enforcement of the alleged violation.

Upon written certification of Office of Attorney General that these conditions have been met, the person or persons with knowledge of the alleged violation may proceed to commence a civil action for any violation of any of the provisions of this chapter.

(D) If the Office of the Attorney General denies certification and fails to pursue enforcement within sixty days of notice or fails to act on a person's notice within thirty days of receipt, the person or persons with knowledge of a violation of this chapter may move to commence a civil action as provided herein.

(E) The civil action must be brought in the name of the State, and may be filed in any state court of competent jurisdiction. The person bringing the civil action may seek any fine or penalty that the State may seek.

(F) A copy of the complaint must be served on the Attorney General if he is not bringing the action, and the director, by the person bringing the action, either of whom may elect to join any action brought by the person.

(G) If the State, as determined by the Attorney General and the Governor acting together, joins with an action brought by a person under this section, the State, in addition to other fines or penalties, may request the suspension or revocation of licenses. The person shall receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to litigating the action. The person

also shall receive an additional amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable hourly attorney's fees and costs, to be paid by the defendant.

(H) If the State, as determined by the Attorney General and the Governor acting together, does not join with the action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and revocation. The amount must not be less than twenty-five percent and must not be more than forty percent of the proceeds of the action or settlement, and must be paid out of the proceeds. The person also shall receive an additional amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable hourly attorney's fees and costs, to be paid by the defendant.

(I) The State is not liable for expenses which a person incurs in bringing an action under this section.

(J) No settlement may be entered without approval by the department.

(K) Any determination in an action under this section that a licensee has violated a provision of this chapter is grounds for revocation of those licenses and the department may bring a subsequent action for suspension or revocation."

PART V

Miscellaneous

Severability

SECTION 20. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this chapter, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Savings clause

SECTION 21. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Intent

SECTION 22. (A) It is the intent of the General Assembly in providing for the statewide referendum required by this act to allow an affirmative vote of the qualified electors of this State to serve as a trigger for the operation of an effective clause, as contained in this act, duly passed by the General Assembly. The result of the referendum is a contingency that is certain, based on the result of a referendum, and will thereby cause some parts of this act to take effect and others not to take effect. All provisions in this act are enactments of the General Assembly that meet the formalities of an act required under Article III of the Constitution of this State which provides for the legislative power in the government of this State. While Article III does not provide for a referendum as part of the legislative process, neither does it prohibit a referendum in which the result is a certain contingency that determines which parts of an act take effect. As the legislative power of the General Assembly is limited only by that which is specifically prohibited in the Constitution of this State and the Constitution of the United States, the General Assembly finds that the referendum required pursuant to this act is a valid exercise of the legislative power of this State.

(B) The General Assembly by enactment of this act has no intent to enact any provision allowed by 15 U.S.C. 1175, commonly referred to as the Johnson Act, or to create any state enactment authorized by the Johnson Act.

(C) It is the intent of the General Assembly that the provisions of this act shall not be construed to:

(1) affect any pending lawsuit, as prescribed in SECTION 21; or

(2) affect any provision of current law, unless or until it is specifically modified

or expressly repealed as provided in this act.

PART VI

Effective Dates

Time effective

SECTION 23. Upon approval by the Governor, this act shall take effect in the following manner:

(A) Parts II, IV, V, and VI take effect upon approval by the Governor;

(B) Article 9 of Chapter 22, Title 12, as added in PART III, SECTION 10, takes effect July 1, 1999 except that Sections 12-22-1020 and 12-22-1030 take effect when the remaining provisions of PART III take effect as provided in subsection (E). If the remaining provisions of PART III do not take effect as provided in subsection (E), then Article 9 of Chapter 22, Title 12 is repealed on the date that the State Board of Canvassers certifies a majority "no" vote in the referendum provided in Part II of this act. Sections 12-22-730 and 12-22-740 and subsections (19) and (22) of Section 12-22-10, as added in Part III, SECTION 10, take effect June 1, 1999. If the remaining provisions of Part III do not take effect, then Sections 12-22-730 and 12-22-740 and subsections (19) and (22) of Section 12-22-10 are repealed on the date that the State Board of Canvassers certifies a majority "no" vote in the referendum provided in Part II of this act;

(C) Part I takes effect July 1, 2000;

(D) If Part I takes effect, the South

Carolina Department of Revenue, upon application, shall refund to any person holding a license for the operation of video game machines, on a pro rata basis, the portion of any license fee previously paid to the department for licenses that extend beyond June 30, 2000;

(E) If the State Board of Canvassers certifies a majority "yes" vote in the referendum provided in Part II of this act, then Part I does not take effect, and the remaining provisions of Part III take effect on December 1, 1999 and SECTION 19 OF PART IV is repealed, except that the provisions of SECTION 21 shall apply to any pending civil actions brought under Section 12-21-2805.

1999 SC H.B. 3834 (SN)

Supreme Court, U.S.
FILED
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CLERK

(3)

No. 99-1406

In the Supreme Court of the United States

JOYTIME DISTRIBUTORS AND AMUSEMENT CO., INC.,
PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF SOUTH CAROLINA
SUPREME COURT

BRIEF FOR THE STATE OF SOUTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the issues raised by the Petition were raised or addressed below?

II. Whether the decision below involves only matters of State law?

III. Whether the decision below infringed First Amendment freedoms when it found statutory provisions for a referendum as to video gaming to be unconstitutional and found bans on payouts on video game machines in that statute to be severable from the provisions for the referendum?

IV. Whether provisions for a republican form of government require the use of a referendum and whether this issue is justiciable?

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JURISDICTION

The State acknowledges that Joytime seeks review as set forth in its statement of jurisdiction, but the State denies that the Court has jurisdiction in this matter because the issues raised by the Petition were neither raised nor addressed below.

STATEMENT OF THE CASE

This Petition challenges the State law decision of the South Carolina Supreme Court in *Joytime Distributors and Amusement Co., Inc. v. The State of South Carolina, Op. No. 25007 (S.C. Sup. Ct., October 14, 1999), 1999 WL 969280.* Appendix (App.) 1. That decision addressed video gaming legislation passed last year by the South Carolina General Assembly. Act No. 125, 1999 S.C. Acts 1319 (App. 23). Part I of that law prohibits cash payouts on video gaming devices effective July 1, 2000. App. 27. Part II provided for a referendum be held ". . . to ascertain whether or not video game machine payouts will continue to be allowed . . . ." App. 33. Part V included a strongly worded severability clause which provided, in part, that a holding that one part of the Act was unconstitutional ". . . shall not affect the constitutionality or validity of the remaining portions of this act . . . ." App. 129.

Joytime initiated this action alleging that the referendum provisions in Part II of Act 125 were an unconstitutional delegation of legislative power to the voters. App. 2 and 3. Pursuant to a Petition by the Attorney General of South Carolina, the South Carolina Supreme

Court agreed to hear the matter in its original jurisdiction. App. 3.

The South Carolina Supreme Court held that the provisions for the referendum ". . .were an unconstitutional attempt to delegate to the people the legislature's power to set the policy of the state and enact laws to effectuate that policy." App. 14 [footnote omitted]. The Court enjoined the holding of the referendum under Part II, but it found that the ban on video gaming payouts in Part I of the law was severable from the unconstitutional portions of the Act. App. 17. Joytime subsequently filed a Petition for Rehearing which was denied by the Court on October 20, 1999. App. 22.

The State respectfully craves reference to the South Carolina Supreme Court's Opinion for a more detailed description of Act 125 and the history of this proceeding (App. 2 & 3) as well as for the decision of that Court as to the merits.

SUMMARY OF ARGUMENT

Joytime has raised for the first time in this Petition Federal constitutional issues under art. IV § 4 and the First Amendment concerning a decision of the South Carolina Supreme Court which never addressed those issues. *Joytime, supra.* As noted in the Statement, that case held that South Carolina statutory provisions for a referendum as to video gaming constituted an unconstitutional delegation of the General Assembly's power to enact the general law of this State and that a ban on video gaming payouts contained in that law was severable. Because Joytime never raised the above Federal issues in the South Carolina Supreme Court and because that Court did not address those questions, they are not subject to review on certiorari. Moreover, no case has ever held that the First Amendment or art. IV § 4 require that States provide referenda procedure for their citizens, and art IV § 4 questions are non-justiciable. Instead, the decision below involved only state law issues as to the constitutionality of the referendum and the severability of the ban on video gaming payouts.

ARGUMENT

I. The Issues Raised by the Petition Were Neither Raised Nor Addressed Below

This Court quoted the following standard of review as follows in *Adams v. Robertson, 520 U.S. 83, 86 (1997)*:

> With "very rare exceptions," *Yee v. Escondido, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L. Ed.2d 153 (1992)*, we

> have adhered to the rule in reviewing state court judgments under §28 U.S.C. 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review....When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented. . . .

Joytime challenges, in this Petition, the South Carolina Supreme Court's decision that the video gaming referendum was unconstitutional even though Joytime, itself, had asserted in that Court that the referendum was an unconstitutional delegation of legislative power to the voters. *Joytime v. State, supra*; App. 2, and, Act No. 125, Part II § 9, 1999 S.C. Acts 1319. The State defended the referendum as being consistent with the State Constitution. Neither the State nor Joytime ever raised the Federal issues set forth in the instant Petition of whether the enjoining of the referendum violates provisions for a republican form of government or First Amendment freedom . U.S. Const. art. IV § 4 and Amend. I. The South Carolina Supreme Court did not address these provisions in its opinion. Accordingly, because the issues set forth in the Petition herein were neither raised before nor addressed by the South Carolina Supreme Court, these issues are not subject to review now by this Court.

II. The Decision Below Involves Only Matters of State Law

The South Carolina Supreme Court's opinion addresses matters that are entirely State law concerns. The Court found legislation providing for a referendum related to video gaming to be contrary to State law by delegating to the people the legislature's power to set the policy of the State and enact laws to effectuate that policy. App. 14. The Court found the unconstitutional parts of the law to be severable from the constitutional parts of the law under the terms of a strong severability clause in that statute. App. 18. Joytime raises no significant or meritorious federal issue about these matters as to which this Court should grant certiorari. *See infra, Arguments III and IV.*

III. The Decision Below Did Not Infringe First Amendment Freedoms

Joytime cites no applicable support for its vague argument that the South Carolina Supreme Court "infringed fundamental First Amendment Freedoms of the South Carolina Electorate by First Enjoining the Referendum on Video Gaming and then itself deciding that such gaming should be outlawed." Pet. 7. It has cited not a single case that holds that the First Amendment entitles voters to a referendum or similar procedure. *See also, infra, Argument IV.*

Those cases that Joytime does cite as to referenda merely address separate speech related activities rather than

whether a referendum or initiative is compelled by the First Amendment. *Meyer v. Grant, 486 U.S. 414 (1988)* struck down restrictions on the use of paid petition circulators under a Colorado initiative process. In doing so it made clear that it was addressing the infringement on speech in these restrictions rather than any purported right to have an initiative process. As the Court stated:

> The decision in *Posadas [de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986)]*does not suggest that "the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling." *828 F.2d, at 1456.* Thus it does not support the position that the power to ban initiatives entirely includes the power to limit discussion of political issues raised in initiative petitions.

486 U.S. at 424. Similarly, *Buckley v. American Constitutional Law Foundation, Inc.*, __U.S.___, 119 S.Ct. 636 (1999) struck down requirements that petition circulators be registered voters and wear name badges. In a different context, *Thomas v. Collins, 323 U.S. 516, 545 (1945)*, addressed registration requirements as applied to a labor union speaker.

None of these cases support Joytime's argument. The instant case involves only questions of State law as to which the First Amendment has no application.

IV. Provisions for a Republican Form of Government Do Not Require the Use of a Referendum and the Issue of Whether a Government is Republican is a Matter for Congress to Determine Rather than the Courts

Joytime cites absolutely no authority that state referenda are rights encompassed by U.S. Const. art. IV § 4 provisions for a republican form of government. Certainly, the framers of the United States Constitution could not have had any such intention to require that States provide for referenda when they did not provide for referenda on the Federal level. South Carolina's Constitution provides for no referenda procedure except under limited circumstances such as constitutional amendments and bonded indebtedness not applicable to the instant natter. *See* App. 8 and 9.

Moreover, the issue of whether a government is republican is a matter for Congress to determine rather than the Courts. *Pacific States Tel. & T. Co. v. Oregon, 223 U.S. 118 (1912).* In *Pacific States,* at issue was whether, contrary to the argument in the instant case, Oregon provisions for initiatives and referenda violate art. IV § 4. The Supreme Court found the question to be a non- justiciable political question for Congress. As stated in *Baker v. Carr, 369 U.S. 186, 223 (1962)*:

> ...the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. The Court has since refused to resort to the Guaranty Clause--which alone had been

> invoked for the purpose--as the source of a constitutional standard for invalidating state action.[1]

The cases cited by Joytime provide no support for its position and do not address art. IV § 4. In *City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 673 (1976)*, the Ohio Constitution specifically reserved the power of referendum to the people of each municipality within the State. The Court stated as follows:

> Since the rezoning decision in this case was properly reserved to the People of Eastlake under the Ohio Constitution, the Ohio Supreme Court erred in holding invalid, on federal constitutional grounds [due process], the charter amendment permitting the voters

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[1] In *New York v. United States, 505 U.S. 144, 184 (1992)*, the Court stated that "[i]n most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." The Court noted that " [i]n a group of cases decided before the holding of *Luther* [*v. Borden, 7 How. 1, 12 L.Ed. 581 (1849)*] was elevated into a general rule of nonjusticiability, the Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable." *Id.* Among those cases was one that addressed a State law under art IV § 4. *Attorney General of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905)*. As noted by the Court in *New York*, *Lowrey* was decided prior to the "rule of nonjusticiability," and it was decided prior to *Pacific States, supra.* which specifically found state referendum questions to be non-justiciable. At issue in *New York* was a Federal rather than State law, and the Court found that it did not need to decide then suggestions as to whether all Guaranty Clause claims are non-justiciable. *Id.*

> to decide whether the zoned use of respondent's property could be altered.

426 U.S. at 679. *Eastlake* is distinguishable because it addressed a specific reservation of powers to hold referenda which do not exist in South Carolina's Constitution.

The South Dakota case cited by Joytime is a State law case inapplicable to this matter. *Wyatt v. Kundert, 375 N.W. 2d 186 (S.D. 1985).* *Wyatt* addressed a constitutional provision that reserved the right of initiative to the citizens, and noted that South Dakota had recognized an inherent right to do so prior to the adoption of the constitutional provision. South Carolina has recognized no right of direct legislation by referendum under its constitution and none is required by art. IV § 4. *Joytime, supra*, App. 8.

CONCLUSION

The Court should deny this Petition.

Respectfully submitted,

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